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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A fundamental rule under the Fifth Amendment is that the impact of the government's project must be ignored in valuing a condemnee's taken property so that the project does not inflate or deflate the amount of just compensation. It is undisputed that PG&E's federal license for an existing private hydroelectric project almost certainly would have been renewed but for the government's project and that the expectancy of that renewal had substantial market value.

A separate rule is that the government need not compensate for some, but not all, kinds of value it has "created." For example, it need not pay the value attributable to expressly revocable federal grazing permits on neighboring land, but must compensate for value created by a nearby completed public works project.

Which rule prevails in this case? Can the government override the rule that the project must be ignored, and thereby deny PG&E a trial on its evidence of an additional $100,000,000 in fair market value for the virtual certainty of renewal, based solely on the contention that its own new project would prevent a renewal of PG&E's license and make PG&E's existing project worthless?

PARTIES IN THE COURT BELOW

All parties in the court below are identified in the caption of this petition. There is no parent or nonwholly owned subsidiary company of Pacific Gas and Electric Company to be listed pursuant to Rule 29.6.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 73 F.3d 953 (9th Cir. 1996). It is reproduced in Appendix A. The district court's relevant unpublished opinions and orders, including its opinion in a related case, which was binding in this case by subsequent order and stipulation, are reproduced in Appendix B.

JURISDICTION

The court of appeals entered judgment on January 11, 1996. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues arise under the Fifth Amendment to the United States Constitution, which provides as relevant here: "nor shall private property be taken for public use, without just compensation. . . . " The statutes involved are Sections 10(i), 14 and 15 of the Federal Water Power Act (codified as amended at 16 U.S.C. §§ 803(i), 807(a) and 808(a)) as they existed in 1929, relevant portions of which are reproduced in Appendix C.

STATEMENT OF THE CASE

A. The Old Melones Dam and Reservoir

The history of this case begins in 1920 when Congress enacted the Federal Water Power Act ("FPA") to

encourage development of hydroelectric energy.[1] Soon thereafter, two irrigation districts put together lands along the Stanislaus River in Central California for the construction of what is now known as the Old Melones Dam and Reservoir ("Old Melones"). The vast majority of lands used for Old Melones were privately owned.[2] However, as required by an 1891 statute,[3] the districts sought permission to use a small section of federal lands within the project's area. On March 23, 1923, the Department of Interior approved a right of way to the districts. As the district court found, the right of way created a limited fee interest greater than an easement and was not revocable at will.

On January 2, 1925, petitioner Pacific Gas and Electric Company ("PG&E") entered into a contract with the

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[1] The restrictive federal policies in effect before the enactment of the FPA discouraged the development of hydroelectricity. A primary purpose of the statute was to induce private capital investment to improve the nation's waterways. Report of the Senate Commerce Committee on S. 1419, December 12, 1917 (Senate Report 179, 65th Cong. 2d Sess.).

[2] Old Melones combined 3,523.52 acres of private land with a right of way across 353 acres of public land. Only 167 acres of the federal lands lay beneath the high water mark of the reservoir itself. App. B at 15

[3] *See* Section 18 of the Act of March 3, 1891, 26 Stat. 1095, as amended by the Act of May 11, 1898, 30 Stat. 404, 43 U.S.C. § 946, repealed by Pub. L. No. 94-579, 90 Stat. 2793 (1976). Because a portion of the required lands had been set aside as a water-power site by President Taft pursuant to the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. § 141, repealed by Pub. L. No. 94-579, 90 Stat. 2793 (1976), the Act of March 3, 1891 required the districts to obtain government approval for the right of way.

irrigation districts. CR 165, Ex. A.[4] The contract provided for the construction of Old Melones and the diversion of water from the Stanislaus River for the generation of hydroelectric power. Pursuant to the contract the districts conveyed to PG&E all rights and interests necessary to construct and operate the project, including the right of way. PG&E built the powerplant and made specified payments to the districts to amortize the bonded indebtedness incurred for construction. CR 184, 3:7-20; CR 186, 3. It also obtained a right, in perpetuity, from the state of California to divert substantial quantities of water through its plant for the generation of power. CR 184, 3:24-4:6; CR 184, 4. PG&E completed the powerplant in 1929.

On November 12, 1929, the Federal Power Commission ("FPC") granted a "minor part" license to PG&E (License No. 708). Supp. ER, p. 20. A key feature of a minor part license was that only a minor portion of federal lands was used in the private project. As an inducement to build the project despite the use of relatively little public land, the government expressly waived its statutory right to take over the powerplant upon expiration of the license. Specifically, License No. 708 waived Sections 14 and 15 of the FPA, (16 U.S.C. §§ 807(a) and 808(a)), which establish the right of the government to take over a power project upon or after the expiration of

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[4] We refer to the Clerk's Record in the district court as "CR," to the Request for Judicial Notice in the court of appeals as "RJN" and to the Excerpts of Record in the court of appeals as "ER" followed by numbers corresponding to the docket number in the Clerk's Record.

a license for less than fair market value.[5] This waiver of the right to take over the project was a significant inducement to PG&E to develop the project because it made it probable that the license would be renewed subject only to a taking upon payment of full market value, including the value of that probability.

By its terms the 1929 license would expire and require renewal on June 1, 1977. CR 184, 4:7-16; CR 186, 4. PG&E continued to make improvements to the Old Melones powerplant for the next several decades. It owned and operated the powerplant continuously to July 8, 1976, the date of taking. CR 184, 5:22-23; CR 186, 6.

B. The Federal New Melones Project and the Government's Taking

In 1944 Congress authorized but did not fund a Federal New Melones project. Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. Under that new project, PG&E would continue to operate its Old Melones powerplant. Congress also stated its intention to pay compensation for any water rights destroyed by the project. *See* App. B at 2-7. It was only in 1962 that Congress authorized the differently located and much larger Federal New Melones project that was ultimately built. Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173.

In the 1950s PG&E assisted the irrigation districts' construction of three new dams along the Stanislaus River, two upstream from Old Melones and one downstream. To facilitate the districts' financing of that project (called Tri-Dam), the FPC issued to PG&E License No.

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[5] Congress authorized waiver of these sections in Section 10(i) of the FPA, 16 U.S.C. § 803(i).

2130, which extended to the year 2004, and incorporated the Old Melones project and License No. 708. Article 36 of License No. 2130 provides that PG&E's compensation, in the event of a Federal New Melones Project, "shall be no more . . . than it would have been entitled to under the license for Project No. 708." ER 31, Ex. F, 10-11. The parties now agree that PG&E's rights and expectations concerning License No. 708 control this case since Article 36's intent was to ensure that PG&E would maintain, but not improve, its No. 708 rights.

As part of the larger project authorized in 1962, the government took from PG&E, by declaration of taking on July 8, 1976, a 42 acre doughnut-shaped parcel of land surrounding PG&E's Old Melones powerplant. The taking literally stranded the plant, cut off its water supply and rendered it incapable of generating electric power. CR 3. Because the taking rendered the entire Old Melones project inoperable, PG&E became entitled to just compensation for its operating powerplant, its California water rights, its interest in the right of way, a reduction in value to its neighboring lands and the value of its expectation of a renewal of its license.

C. PG&E's Expectation of Renewal of its Minor Part License

PG&E had a strong expectation that its minor part license for Old Melones would be renewed. That was the expectation in 1929 when the license issued without the Section 14 take over condition. It was the expectation in 1944 when Congress authorized a Federal New Melones project that contemplated continued use of PG&E's hydroplant and payment for any water rights taken. And it was the expectation in 1976 when, in the wake of the

Arab oil embargo and increased awareness of the vital need for domestic energy, the government took PG&E's property.

More broadly, renewal was the general expectation as to *all* minor part licenses since, by definition, the government waived its right to take over those projects. That expectation was expressly recognized in federal regulations and practice in effect in 1976 at the time of the taking and today.[6] Moreover, since 1977 the Federal Energy Regulatory Commission (the FPC's successor) has granted each application for renewal of a minor part license with terms and conditions similar to Project No. 708. CR 36, 22:9-23 & n.13. Indeed, the government does not dispute that the FERC would have renewed PG&E's license but for the federal project, and the opinion below recognized "the high likelihood of renewal." App. A at 5.

D. Course of Proceedings and Disposition Below

The government filed two related actions against PG&E in the Eastern District of California to establish compensation for its taking of Old Melones. Both were assigned to Judge Milton Schwartz.

The first was *United States v. 3613.95 Acres*, No. S-2488 MLS. A key 1983 ruling in *3613.95 Acres*, described below, is binding in this action by stipulation and order.

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[6] Section 16.12 of the FPC's regulation, 18 C.F.R. § 16.12 (1976), expressly contemplated renewal of minor part licenses and Section 9 of the Administrative Procedure Act, 5 U.S.C. § 558(c) (1977), stayed expiration of a license pending action on a licensee's application for a new license. Those provisions continue in the form of 18 C.F.R. §§ 16.20 and 16.21 (1996).

The second was this case. In it the district court changed its mind three separate times, first ruling that PG&E was entitled to compensation for its expectancy of a license renewal, then reversing itself, then returning to its original decision and then finally ruling that PG&E had waived any rights related to renewal due to Article 36 and the government's new project. Although both were extensively argued to it, the court of appeals failed to mention either the binding *3613.95 Acres* decision or the repeated reversals in this action.

1. The District Court's 1983 Decision in *3613.95 Acres*

The government filed its *3613.95 Acres* case against both PG&E and the two affected irrigation districts to condemn property required for the Federal New Melones project. In 1980 the government filed a motion for partial summary judgment to establish that it owed no compensation for "the loss of the powerhead resulting from elimination of the fall of water through [the Old Melones] dam."[7] App. B at 1. On September 9, 1983, the district court denied the motion and, in a 25 page opinion, found that (1) "the condemnation of the old Melones Dam and Reservoir was not an exercise of the Government's navigational servitude power" and (2) the government had not reserved a "power interest" to defeat compensation for destruction of the powerhead. App. B at 2-7, 7-27.

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[7] PG&E participated in the briefing on the motion; it was made binding on PG&E and the government in this case by subsequent stipulation and order, dated February 6, 1987. RJN Ex. B.

The second ruling is particularly noteworthy since it rejected reliance on *United States v. Fuller*, 409 U.S. 488 (1973) (*"Fuller"*) on which the Ninth Circuit's contrary decision below rests. The government contended that the location of a portion of the bed of the Old Melones reservoir within a federal powersite reserve and the nature of the right of way granted the districts allowed it to destroy the powerhead "without liability." Specifically, the government argued that under *Fuller* it was not "required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." App. B at 10 (quoting *Fuller*).

The district court found the government's *Fuller* argument unpersuasive for several reasons. First, after a careful review of the government's 1923 grant, it held that the Old Melones right of way was not a revocable at will easement, analogous to grazing permits at issue in *Fuller*. Rather, the districts (and PG&E) held "a limited fee [in the federal land] subject to a reversionary interest." App. B at 13.

Second, the court concluded that the relationship between the private lands used for Old Melones and the relatively small portion of federal land did not parallel the relationship between the condemned lands and grazing permits in *Fuller*:

> Far from being an extra benefit conferred on entirely separate private lands of the Districts, the right of way was a necessary prerequisite to the establishment of the old Melones Dam and Reservoir which was, to say the least, a major financial undertaking. It would destroy all notions of ownership, equity and common sense

> to find that the Government's condemnation of the old Melones Dam and Reservoir in order to build its own dam and powerhouse could render all power rights that arose incident to the construction of old Melones worthless simply because the condemned lands encompassed [a] . . . right of way across a relatively small strip of federal powersite reserve land in an otherwise privately owned and financed reservoir. App. B at 15-16.

Third, the court rejected the government's argument, again based on *Fuller*, that it, like a private party, may change the use of its property without paying compensation for the loss in value to neighboring land. The government argued it specifically reserved the right to do so when it conditioned the right of way upon granting of a FPC power license. But the district court found the government had no ability to affect the value of the districts' other property without paying for it: "the reservation of power authorization rights by the Commission in the right of way approval is not tantamount to a statement that no compensation is to be paid for property interests taken pursuant to that reservation." App. B at 17.

2. The District Court's Decisions in 1988 through 1993

The district court ultimately held on partial summary judgment that PG&E could not submit any evidence that its expectancy of a license renewal had a compensable value. However, the court changed its mind several times before reaching that final decision.

First, the government moved for partial summary judgment,[8] contending that Article 36 of License No. 2130 waived PG&E's right to be paid for the expectancy of renewal. On June 28, 1988, the district court denied the motion: "Article 36 contains no waiver of PG&E's right to argue for the value of prospective license renewal as a part of just compensation." App. B at 34-35. Since "[c]ourts must not consider the impending government project as a basis for decreasing this possibility," the court ruled that "[j]ust compensation shall include any added value found to be due to PG&E's expectancy of license renewal," which it held to be a question of fact. App. B at 36.

Second, on March 23, 1990, on a motion for reconsideration, the district court reversed itself. It held that, because of the pendency and funding of the government's Federal New Melones project, PG&E could not demonstrate a reasonable probability of continued licensing of Old Melones and therefore could not put on "evidence of additional damages based on renewal expectancy value." App. B at 43.

Third, on January 2, 1991, the court reversed itself again. It ordered that PG&E was not precluded "from submitting evidence on the value of its state created water rights taken by plaintiff and that such evidence is not limited by Article 36 of the federal license for the period from the taking to the termination of the license." App. B at 46. The court confirmed its order at a May 10,

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[8] When the government filed its motion in 1986, it was before Judge Milton Schwartz who had also presided in *3613.95 Acres*. By the time the motion was denied, the case had been transferred to Judge Edward J. Garcia. Judge Garcia made the initial 1988 ruling and all others referred to in this case.

1991 hearing. It ruled that the government's proposed project must be ignored in the valuation process and that its appraisers could not assume nonrenewal due to the taking. "[T]he Government's appraisers should determine the value a willing buyer would have paid PG&E for its water right in July of 1976 as if Congress had never contemplated the [Federal] New Melones Project." ER 125, p. 21.

Finally, on the eve of trial, the district court reversed itself again. Based on the prior ruling, PG&E's appraiser had valued PG&E's taken interests, including an expectancy of renewal, at $102,000,000. However, the court announced at a pretrial conference on instructions that it had again changed its mind, that it had "made a mistake" and that its prior rulings were "in error." ER A, p. 2-3. The court now ruled, "In this case it is not reasonably probable that a hypothetical buyer of Defendant's water rights could put them to use generating hydropower because that buyer could not also obtain a FERC license in view of the Government's decision to build the tri-dam [*sic*] [Federal New Melones] project." *Id.* pp. 4-5. This final reversal was a direct holding that, as a matter of law, PG&E was not entitled to compensation for its expectancy of license renewal because of the impact of the project itself. The court confirmed its reversal in writing on July 9, 1992.[9] App. B at 48. It also certified its ruling

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[9] PG&E's appraiser then submitted a new report which followed the district court's latest ruling and included a reversionary value of the powerplant – the value the plant would have, at the expiration of PG&E's license, to a party who wanted to obtain its own license to generate hydropower at Melones, even though PG&E could not renew its license. ER 174. The district court excluded this second appraisal by ruling that

for interlocutory appeal under 28 U.S.C. § 1292(b) along with a finding that "[t]here is substantial ground for difference of opinion, as shown by comparing the courts' two rulings on the issue. . . . " ER 153, p. 2.[10]

Because the district court's ruling had so devastated PG&E's valuation case, the parties stipulated to a judgment, subject to appeal of the district court's rulings, in the amount of the government's initial deposit of $1.3 million. As permitted in the stipulation and order, PG&E filed a detailed offer of proof of the evidence it would have offered at trial, but for the last ruling of the district court. The stipulation and judgment were entered on May 17, 1993.

3. The Court of Appeals' Decision

PG&E appealed to obtain a trial on the issue of valuation under a proper instruction that the project must be ignored and compensation include whatever value the market placed on PG&E's taken property, including the expectancy of renewal on the date of taking. The court of appeals issued its opinion affirming summary judgment on January 11, 1996. App. A.

The court held that PG&E's expectancy of renewal could not be valued, despite the $102,000,000 appraisal

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its prior decision "foreclose[d] the possibility that anyone would be able to obtain a federal power license after June 1, 1977." ER 183, p. 5.

[10] The court later issued an order clarifying its certification order, stating that certification was not intended to be effective unless settlement negotiations failed. ER 155. PG&E's subsequent petition for permission to appeal immediately was denied by the court of appeals. ER 171.

because the government "owned the right to use its lands as it chose, even if it destroyed the value of PG&E's interest" after the expiration of the power license. App. A at 8. Contrary to the district court's binding ruling in *3613.95 Acres*, it concluded that *United States v. Fuller*, 409 U.S. 488 (1973), not *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), controlled because the government had a "contractually preserved right to do as it chooses." App. A at 8. The court also summarily rejected the general rule that a condemnation award cannot be reduced due to a decrease in value caused by the taking because PG&E's license was due to expire a year after the declaration of taking, and therefore the government had a "right to use government property which is unencumbered by a property interest of the condemnee." App. A at 10.

Despite the fact it was reviewing a summary judgment ruling *de novo*, the court of appeals without discussion assumed throughout its opinion that PG&E's rights were revocable at will after the date of expiration of License No. 708. App. A at 8. That fundamental assumption was the underpinning to the court's analysis of *Almota* and *Fuller*, as well as its rejection of the general rule to ignore devaluation caused by the taking. Although each was extensively briefed, the court of appeals never mentioned (1) Judge Schwartz's contrary 1983 finding that the government had granted a limited fee interest in the right of way, (2) the unique aspect of PG&E's minor part license in which the government had waived its right to take over the project for payment less than just compensation or (3) his 1983 finding that *Fuller* did not apply due to the relationship between the private

property and the government's minor contribution to the Old Melones project.

REASONS FOR GRANTING THE WRIT

Summary of Argument

In dozens of opinions stretching over a century this Court has been the final arbiter of where the line falls between uncompensable governmental impact on private property and takings requiring full and fair compensation. Time after time this Court has rejected arguments of the United States that no or lower compensation was just under the Fifth Amendment.[11] In doing so, the Court has created "working rules" of just compensation "to do substantial justice" and to provide guidance to the lower courts, the government and those whose property interests are impacted by its actions. *United States v. Miller*, 317 U.S. 369, 376 (1943); *Fuller*, 409 U.S. at 492; *United States v. 564.54 Acres*, 441 U.S. 506, 511 (1979).

This case presents a direct and important conflict between two of this Court's previously announced "working rules" of just compensation. One rule, first stated in *Miller*, 317 U.S. at 379, is that the value of the taken property "must be neither enhanced nor diminished" by the government's proposed project. *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 636

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[11] To reference but a few examples: *United States v. 50 Acres*, 469 U.S. 24 (1984); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961); *Olson v. United States*, 292 U.S. 246 (1934); *International Paper Co. v. United States*, 282 U.S. 399 (1931); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884).

(1961). Under this "ignore the project" rule, "the court must exclude any depreciation [or appreciation] in value caused by the prospective taking. . . . " *Id. See also United States v. Reynolds*, 397 U.S. 14, 16 (1970). In *Almota*, 409 U.S. at 478, that rule was applied to require compensation for the value of an expectancy of renewal of a private leasehold even though the project would make renewal impossible and even though the condemnee had no property interest in a renewal.

The second rule arose in *Fuller*. A bare majority of the Court discerned "the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than eminent domain." 409 U.S. at 492.[12] The Court noted its rule could not "be pushed to its ultimate logical conclusion" and distinguished value created "by a completed public works project, for which the Government must pay. . . . " *Id.*

These two rules collide in this case. PG&E's license to operate Old Melones would almost certainly have been renewed but for the government's proposed project. If the long-standing rule to ignore the project were followed, and the market value of the expectancy of renewal deemed relevant, PG&E would be entitled to a trial on its

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[12] *Fuller* stands in sharp contrast to *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 284 (1943), in which the Court noted "general principles" that "the United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation."

$102,000,000 appraisal. Under the *Fuller* rule, however, the government need not pay for value that it has "created" – at least, if PG&E's limited fee right of way and minor part power license that waived the right to take over the project without paying full market value are akin to revocable at will grazing permits on neighboring lands.

Thus, this case raises a fundamental issue of constitutional property rights. How is the ignore the project rule to be reconciled with a rule that does not require compensation for value added by some, but not all, kinds of government activity? Or to put it in the context of this case, where PG&E constructed a powerplant project based on a minor part power license that admittedly would have been renewed but for the taking, can the government avoid paying any compensation for destroying the entire value of PG&E's existing project? PG&E contends that the government cannot rely on its taking to destroy that value – particularly when so little of the private project's value is dependent on federal activity.

The result below unfairly tramples PG&E's Fifth Amendment rights. It allows relatively minor federal involvement, however characterized, to trump substantial private property interests with real value. It allows the government, solely by hindsight use of its own taking, to avoid the evidence of the actual value of PG&E's property and pay nothing for it. It denies a trial on the merits of just compensation under the guise of a blanket legal rule. If this result stands, the government's ability to reduce the amount of compensation has no principled limits so long as the government has previously contributed to the overall value of the private property at stake.

The Court's development of "working rules" has worked well to define the contours of the Fifth Amendment's just compensation mandate. But when, as here, two rules cannot be reconciled on their face, only this Court can provide the necessary guidance. Indeed, the conflict presented here is the very one anticipated by the Court in the *Almota* and *Fuller* majority opinions. Both were handed down the same day. Both were 5-4 decisions, and only Justice Stewart was in the majority in both cases. Resolving the conflict between them is perhaps the only fundamental issue left open under the Court's "working rules" affecting the amount of compensation the government must pay for its takings. We respectfully urge the Court to grant this petition to resolve this important issue concerning the balance between private property rights and governmental authority.

ARGUMENT

I. BASED ON 50 YEARS OF PRECEDENT, COMPENSATION IS NOT JUST UNLESS IT IGNORES DEVALUATION CAUSED BY THE GOVERNMENT'S NEW PROJECT

Beginning with *United States v. Miller*, 317 U.S. 369 (1943), this Court has consistently reaffirmed the bedrock eminent domain principle that the impact of the pendency of the government's project – either up or down – must not be taken into account in determining the fair market value of the taken property. *See Virginia Electric*, 365 U.S. at 636; *Reynolds*, 397 U.S. at 16; *Almota*, 409 U.S. at 478. In *Miller* the impact of the government's taking was to increase the value of the condemnees' property. The Court concluded that the owners "were entitled to no

enhancement in value due to the fact that their lands would be taken." 317 U.S. at 379. Its ruling was grounded in the logic that if "the lands were probably within the scope of the project from the time the Government was committed to it . . . [t]he owners ought not to gain by speculating on probable increase in value due to the Government's activities." *Id.* at 377.

The flip side of the coin – when the taking devalued the condemned property – arose in *Virginia Electric*. The Court "emphasized" that the "value of the easement must be neither enhanced nor diminished by the special need which the Government had for it." 365 U.S. at 636. Thus, in a holding controlling here, the Court held the trial court "must exclude any depreciation in value caused by the prospective taking. . . . " *Id.* The Court concluded by quoting 1 LEWIS ORGEL, VALUATION UNDER EMINENT DOMAIN, § 105 at 447 (2d ed. 1953): "It would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . [of construction of a government project] and then to take advantage of this depression in the price which it must pay for the property." *Id.*

In *Almota*, the Court applied the ignore the project rule to hold that just compensation for the condemnation of a private leasehold without a right of renewal included the market value of "the expectancy that the lease would have been renewed." 409 U.S. at 470. The government "may not take advantage of any depreciation in the property taken that is attributable to the project itself." *Id.* at 478. The Court rejected the government's argument that its project would prevent any renewal of the lease. "By failing to value the improvements in place over their useful life – taking into account the possibility that the lease might be renewed as well as the possibility that it

might not – the [court below] failed to recognize what a willing buyer would have paid for the improvements." *Id.* at 474. Specifically, "[i]f there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements . . . it would have been compensated for the buyer's ability to use the improvements in place over their useful life."[13] *Id.* In short, a fair market price – and just compensation – must reflect any expectancy of renewal. That the taking would make renewal impossible must be disregarded in determining just compensation.

Almota requires a reversal of the decision below. PG&E presented substantial evidence that it would have received a renewal of its minor part license to continue generating clean and efficient hydroelectricity; the court of appeals acknowledged the "high likelihood of renewal" but for the taking. App. A at 5. As in *Almota*, the fair market value of PG&E's property holdings, as of the July 8, 1976 taking, would include a substantial value for that expectancy and the continued use of PG&E's plant, as reflected in PG&E's $102,000,000 appraisal. If the project is ignored, as it must under *Almota* and *Virginia Electric*, this evidence was improperly excluded on the district court's partial summary judgment ruling, affirmed by the court of appeals.

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[13] The *Almota* Court acknowledged the contemporaneous *Fuller* decision by noting the facts before it did not raise the issue of what compensation should be paid where "action by the Government" or "location adjacent to public property contributed" value to an interest. 409 U.S. at 476 n. 3.

II. NO VALID REASON EXISTS TO REJECT THE IGNORE THE PROJECT RULE IN FAVOR OF THE *FULLER* RULE

No prior authority has ever created an exception to the ignore the project rule. Indeed, the government initially conceded the rule should apply.[14] However, the court of appeals summarily concluded that the ignore the project rule should not apply because the government's use of its property was "unencumbered by a property interest of the condemnee." App. A at 10. It also held that *Fuller*, not *Almota*, controlled because the government had "contractually preserved [a] right to do as it chooses" after the expiration of PG&E's power license. App. A at 8. Thus, the court's decision is based, not on the fair market value of PG&E's property on the date of taking, but instead on its assumptions about the government's property and contract rights one year later.

The court of appeals' attempt to resolve the Fifth Amendment issue as a matter of property interests or contract rights is both factually erroneous and too narrow as a matter of law. The decision below improperly failed

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[14] The government's position in this case, for many years, was that the ignore the project rule should apply, but that PG&E had specifically waived its rights under that rule in Article 36 of License No. 2130. As late as June 1992, the government "agreed with [PG&E's counsel] that the property's to be *valued without regard to the pendency of the project* [but] not without regard to Article 36." ER 137A, p. 10 (emphasis added). It was not until the government filed its brief in the court of appeals that it abandoned its Article 36 waiver argument and adopted its new position, which it conceded contravened "the general rule that the pendency of the government's project [is] not taken into account in condemnation cases." Govt. Opp. Brief at 27.

to examine or explain the evidence supporting its conclusion as to PG&E's property interests or the government's contractually preserved rights, even though both parties extensively briefed the issue. That evidence shows that (1) PG&E has a limited fee interest in the 1923 right of way and (2) the government in 1929 waived its right not to renew PG&E's license for less than full market value. More importantly, *Almota* and the ignore the project rule require consideration of PG&E's evidence that the market would value PG&E's right beyond the expiration date of the license. The government cannot constitutionally destroy that market value based on hindsight consideration of the proposed project.

Nor is there any other basis to conclude that the *Fuller* rule should trump the ignore the project rule. The fact that the government has participated in the "creation" of value – here through a right of way over five per cent of the lands used for the reservoir and a license specifically preserving PG&E's right to full market value compensation for a taking – does not automatically mean that its new proposed project can be utilized to destroy the entire value of the condemnee's private property. Not paying for value created by revocable adjacent grazing rights, as in *Fuller,* is one thing. Destroying the entire value (except salvage) of an operating powerplant with improvements, state water rights, the right of way and neighboring lands is another – it would allow the government's eminent domain power to overwhelm substantial private property rights based solely on the taking itself.

A. The Court Of Appeals' Erroneous Assumption That The Government Had A Right To Revoke PG&E's Old Melones Rights At Will Does Not Overcome The Ignore The Project Rule

1. The Government Did Not Reserve A Right To Revoke The Old Melones Right Of Way Or PG&E's Minor Part License

Approximately five per cent of the lands utilized for Old Melones are federal. *See* n. 2 above. When the government granted a right of way across that federal parcel in 1923 for purposes of developing power at Old Melones, it granted a limited fee interest and did not retain a right to revoke at will. That is not a remarkable proposition; Judge Schwartz found it in a ruling stipulated to be binding in this case.[15] Yet, without any analysis, the court of appeals simply assumed PG&E had no property interests.

Nor did the government preserve a right to revoke PG&E's license. In fact, as an inducement to PG&E's private investment, the FPC waived the usual rights of the federal government to take over the power project for

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[15] Judge Schwartz rejected the government's previous contention that the Department had granted only a revocable easement. The right of way included only three conditions, none of which required, either explicitly or implicitly, the district or its successor PG&E to return the right of way without just compensation. None would have resulted in a termination of the right of way on July 1, 1977. Indeed, the government's failed argument in the district court was based on other governmental interests – its navigational servitude and a "reserved power interest" – unrelated to the express conditions of the right of way and, in any event, rejected by the district court.

less than payment of full just compensation.[16] The court's assumption to the contrary flies in the face of that 1929 waiver. Having waived its Section 14 rights to take over the project for less than just compensation, the government cannot be in a better position to take over the project and pay nothing.

The court of appeals also suggested that PG&E's 48-year generation of power was somehow full compensation: "PG&E protected the value of its investment against policy changes by securing a 48 year license." App. A at 8-9. The error of that unsupported assertion is that, *before PG&E made its investment*, it secured the express waiver of the government's right to take over the project at the end of those 48 years for less than full compensation. Having granted PG&E a waiver to induce the original investment, the government cannot pretend the waiver is meaningless 48 years later.[17]

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[16] Specifically, the FPC waived Section 14 of the FPA (codified as amended at 16 U.S.C. § 807(a)) which established the right of the government to take over a power project for less than fair market value upon or after the expiration of a license. The FPC also waived related Section 15 (codified as amended at 16 U.S.C. § 808(a)) which provided that, if the government did not exercise its Section 14 right to take over the project, the FPC may issue a new license with whatever conditions and terms are then allowed. App. C.

[17] The significance of a Section 14 waiver to the decision to proceed with development or not is reflected in *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940). There the government suggested resolution of its right to take over a private hydroelectric project be deferred until it claimed the right to purchase fifty years after the issuance of the license. This Court rejected that proposal. "[W]e conclude that here the requirements of § 14 so vitally affect the establishment and financing of respondent's project as to require a determination of their validity [immediately]. . . . " *Id.* at 421.

Once the fallacy of the court of appeals' revocable interest assumption is removed, the error in the court's decision is obvious. If the government has not retained a right to revoke at will (not "contractually preserved" its rights), the condemnee has a property interest and must be paid compensation upon taking. *See, e.g., Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 304 (1976) (must compensate for value of renewal); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 343-45 (1893) (must compensate for value of nonrevocable state created right to charge tolls for use of lock).

In contrast, in *Fuller*, which the court of appeals found controlling, the Taylor Grazing Act permits were "revocable by the Government" and its provisions, by statute, did "not create any right, title, interest, or estate in or to the lands." 409 U.S. at 489.[18] Therefore, both as a matter of logic and fairness, the government's grant of property and power interests without reserving a right of revocation (and, indeed, preserving PG&E's right to full market value compensation) triggers the Fifth Amendment's guarantee and requires compensation for the

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[18] All other cases cited by the government or the lower court (73 F.3d at 957) also involved revocable at will interests. *See Ryan Outdoor Advertising, Inc. v. United States*, 559 F.2d 554, 557 (9th Cir. 1977) (federal permit for sign along Interstate highways was "revocable at any time"); *United States v. 5.96 Acres (Knappton Towboat)*, 593 F.2d 884, 888-89 (9th Cir. 1979) (pilings and dikes built pursuant to "revocable at will" permits; also government acted pursuant to navigational servitude). *See also United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 68-70 (1913) (dams built pursuant to "revocable at will" permits from War Department; taking allowed due to navigational servitude) (cited by government below).

expectancy that power would continue to be developed in the future.

2. The Expiration Date Of PG&E's Power License Does Not Mean The Government Can Invoke The Taking And Fail To Pay The Value Of The Expectancy Of Renewal

The court of appeals did not analyze PG&E's property interest in the right of way or its expectation of a renewal of its license. Instead, it simply assumed the government was free not to renew after the license's expiration date in order to save itself money: "The termination date in the 1929 license preserved that right [to use lands as it chose and destroy PG&E's interest] to the government." App. A at 8.

That assumption is not only erroneous, it does not meet the relevant legal issue. The Fifth Amendment issue is not what the government legally could have done when the license expired but rather what was the value of PG&E's property when it was taken a year before the license expired. *Almota*, 409 U.S. at 474. *See also Miller*, 317 U.S. at 369 (just compensation is value of owner's loss, not property's value to the government). That value was undoubtedly enhanced by the high probability that the license would be renewed, and the only way that value can be ignored is by improperly relying on the government's new project. Of course, the *Almota* lease had an expiration date, too; indeed its rights were clearly revocable after the lease ended. *Id.* at 471. Yet the market valued an expectancy of renewal, just as it did here, for which the government must pay.

The court of appeals' reliance on an expiration date is thus entirely circular and begs the question of whether

the government can benefit from the depreciation caused by the taking itself. Under *Almota*, it cannot properly conclude there was no value to an expectancy of renewal at the time of the taking based solely on the fact the license would subsequently expire. The court cannot assume, in the face of contrary evidence, that the license would not have been renewed or that the market did not value that expectation.

B. To Deny All Value To Old Melones Due To Prior Government Action Which Added Value Is Arbitrary And Unfairly Depreciates PG&E's Private Property

Quite apart from its error in assuming revocable rights, the court of appeals did not properly balance public and private interests in ruling that the government's right to use its property trumped all of PG&E's rights after July 1, 1977. PG&E's purely private Old Melones interests included its operating powerplant, its state water rights and its adjoining lands. The government added to the project a right of way across 167 acres inundated by the Old Melones reservoir and a license. The court below decided that the government could render useless all of PG&E's substantial private property interests because its license would subsequently expire and require renewal. That conclusion does not follow from denial of compensation to the *Fuller* ranchlands owner for revocable federal grazing rights and does not justify rejection of the ignore the project rule. When it destroyed the entire value of PG&E's Old Melones project through the power of eminent domain, the government was obligated under the Fifth Amendment to compensate PG&E for the fair market value of its private property on the

date of taking, including the expectancy of a license renewal, however the market valued the possibility of renewal.

The fact that PG&E's expectancy was a renewal from the federal government, and not a private party, makes no difference in the application of the ignore the project rule. To turn the outcome on the identity of the licensor, whether private or governmental, is arbitrary and unrelated to valuation. The error is in foreclosing any trial on valuation based purely on the presumptive conclusion that the FERC would have denied PG&E's application for renewal at the end of the license term, rather than allowing a determination of the fair measure of value of PG&E's property at the date of taking, including the value of the expectation at that time concerning a renewal. The issue is not what the government could have done, just as what the lessor could have done was not the issue in *Almota*. The issue is simply the value of the probability of what either would have done *but for the project*. The court below impermissibly used the project to determine compensation by relying on hindsight to identify the government's "choice" not to renew. Therefore, there was a triable issue as to the value of that prospect.

Moreover, it is not fair to allow the government to obtain through eminent domain all value attributable in some way to its unrelated licensing authority. Otherwise the government could automatically reduce condemnation value by excluding evidence that the property had value arising from, among other things, access to federal highways, water projects or any other federal use or permit. As Professor Tribe has reasoned, without some external constitutional limitations, "we are defenseless against the alluring but fatal argument that, since it is government that gives, government is free to take as

well." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-7, at 608-09 (2d ed. 1988). Even *Fuller's* bare majority recognized its rule was limited. 409 U.S. at 492. But it was not required to draw any lines on the facts before it. This petition should be granted to establish those limitations; but whatever they are,[19] they should be set so that the government cannot constitutionally destroy $100,000,000 in value of an operating private facility based only on the fact it had previously licensed it for a set term.

Finally, the government cannot fairly have it both ways. It can't fail to pay when it has previously enhanced value, and refuse to pay when its prior actions depressed value. If a condemnee cannot receive as part of just compensation an amount attributable to prior, unrelated government activity (for example, zoning) that depreciated the value of its property, then the government cannot fail to pay compensation for value on the date of taking attributable to prior federal activity that the taking

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[19] *Fuller* provides this limited guidance: while the additional value due to proximity to grazing lands was not compensable, the additional value attributable to a nearby "completed public works" was. 409 U.S. at 492. This case does not involve value due to nearby federal interests, but the relationship between private and public interests in this case is much more similar to the completed public works analogy in which the government's contribution to value is limited. As a private project completed with minimal federal support, the government should not be able to render PG&E's substantial private interests valueless solely in reliance on the fortuity of the Federal New Melones project. Rather, the fair market value to PG&E or a willing buyer is the fair measure of just compensation – including whatever value the market assigns to the probabilities of a renewal of a power license – so that the market, and not an arbitrary and presumptive consideration of the taking itself, determines what makes the condemnee whole.

has destroyed. In short, the government can't benefit from both prior depreciation and appreciation. Rather, the just compensation issue is the value of the taken property on the date of taking.

The Court's decision in *Virginia Electric*, authored by the only Justice in the majority in both *Almota* and *Fuller*, illustrates the manifest unjustness of the result below. There the government's taking, a flowage easement over 1840 acres to be used for a dam and reservoir, destroyed an electric company's exclusive flowage easement over 1540 acres within the government's easement. The government had a navigational servitude over the river (described as "the privilege to appropriate without compensation") and contended that the electric company's easement "had no value save in conjunction with water power development." *Id.* at 627, 629. This Court disagreed. It found the private easement had nonriparian value despite the navigational servitude and in valuing that interest "no weight" could be given to the fact the taking would destroy the easement. *Id.* at 635-36.

If the electric company in *Virginia Electric* was entitled to compensation, PG&E clearly is. *Virginia Electric* involved the government's navigational servitude, and this case by an unappealed, binding ruling does not. Therefore, in contrast to Virginia Electric, PG&E has both riparian and nonriparian rights neither of which is limited by a superior navigational servitude. Moreover, Virginia Electric's property interest was only an unused flowage easement. In contrast, PG&E had an operating powerplant with improvements, adjoining fee lands, state water rights and a right of way – all of which were effectively taken by the government and most of which were entirely private or non-federal. Critically, unlike Virginia Electric, PG&E also had an existing power

license and an expectancy of a renewed power license in the future. If Virginia Electric was entitled to a trial on the merits of the value of the nonriparian rights of its flowage easement, PG&E is certainly entitled to a trial on the value of its destroyed existing power project.

This case demonstrates that the Court's "working rules" of just compensation don't work in this setting. They need further examination to reconcile the fundamental conflict between *Almota* and *Fuller* and to provide guidance to the valuation of takings in the context of prior federal licensing or permitting. We respectfully submit that the petition should be granted to provide that reconciliation and guidance.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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April 9, 1996

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

42.13 ACRES OF LAND, Defendant,

and

Pacific Gas and Electric Company,
Defendant-Appellant.

No. 93-16248.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 16, 1995.

Decided Jan. 11, 1996.

Federal government brought condemnation action respecting federal property which was location of electric utility's hydroelectric plant. The United States District Court for the Eastern District of California, Edward J. Garcia, J., granted summary judgment for government, awarding utility value of its remaining ten and one-half months on plant license plus salvage value of plant, but not awarding any compensation for money plant would have generated had its license been renewed. On appeal, the Court of Appeals, Kleinfeld, Circuit Judge, held that condemnation award did not have to include value of expectation of renewal of utility's federal license for plant, but could be limited to value of utility's remaining ten and one-half months on plant license plus salvage value of plant.

Affirmed.

Richard Murray, McCutchen, Doyle, Brown & Enersen, San Francisco, California, for defendant-appellant.

Robert L. Klarquist, United States Department of Justice, Washington, DC, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before REINHARDT, THOMPSON and KLEINFELD, Circuit Judges.

OPINION

KLEINFELD, Circuit Judge:

The issue in this case is whether a federal condemnation award has to include the value of an expectation of renewal of a federal license.

I

FACTS

The Federal Power Commission issued a license pursuant to the Federal Power Act, 16 U.S.C. §§ 791a, 797(e), et seq., to Pacific Gas & Electric Company (PG & E) in 1929, to use federal land on the Stanislaus River for a dam, reservoir and plant to generate electricity. The license would by its express terms expire June 1, 1977. This was then called the Melones dam and reservoir, and subsequently became known as the Old Melones hydroelectric project.

In 1944, Congress authorized a new and bigger project at the same site, called "New Melones." Flood Control Act of 1944, P.L. No. 78-534. Even though it was

authorized and planned, this New Melones project was not funded or built in the 1940's. In the 1950's, the irrigation districts nearby arranged with PG & E to assist them in building three dams separate from the Melones project. To enhance its ability to get long term financing, PG & E sought to extend its license on Old Melones. The Federal Power Commission was willing to do that, but sought to protect its flexibility in case it ever got the money from Congress to build New Melones, still languishing in file folders since 1944.

The Federal Power Commission accomplished these objectives by issuing a new license in 1955 that extended PG & E's 1929 license termination from 1977 to 2005, but contained a proviso that if the government condemned the license, it would have to pay only as much as it would have paid under the earlier license with a 1977 termination date.[1]

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[1] The 1955 license contains this language:

> Article 36. In the event the existing Melones development of the Licensee shall be taken over in whole or in part or impaired or damaged by the United States in connection with the construction, operation or maintenance by the United States of a New Melones Reservoir (authorized by Section 10 of the Act of December 22, 1994 [58 Stat. 887, 901] for construction by the Corps of Engineers) the compensation to which the Licensee shall be entitled for any such taking by the United States shall be no more up to June 1, 1977 (former expiration date of the license for Project No. 708) than it would have been entitled to under the license for Project No. 708.

The parties do not now dispute the proposition that this meant PG & E could not claim any more damages in the event of a

New Melones was reauthorized and funded in 1962. Flood Control Act of 1962, Pub.L. No. 87-874. On July 8, 1976, fourteen years after the New Melones Project was reauthorized and 10½ months before PG & E's license for the Old Melones Project would have expired, the United States filed a declaration of taking, by which it acquired land surrounding the PG & E plant. The taking cut off the water supply for Old Melones, rendering it worthless except for salvage.

The only issue in this case is how much money the government owes to PG & E as just compensation. PG & E initially claimed $102 million. This was based on an appraisal completed by PG & E's expert's analyzing fair market value between a willing buyer and a willing seller, assuming that the license had been renewed and the government was not condemning PG & E's property. Basically, PG & E's expert used the present value of a sixty year stream of income to determine what Old Melones would have been worth, had it not been condemned.

The United States took the position that just compensation was only $1.3 million. This valuation was based on the assumption that the license would not be renewed, so compensation should be for the value of PG & E's interest under a license expiring in 1977. The parties stipulated that the government's $1.3 million deposit at the time of the taking was the value of the 10½ months PG & E had left on its license plus the salvage value of the plant at the time of the taking.

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taking of its Old Melones Plant for the New Melones project than it would have been entitled to if its license expired in 1977, pursuant to the 1929 license.

The district court granted summary judgment in favor of the government. PG & E argues that it is entitled to compensation for Old Melones, taking into account the money Old Melones would have made had it not been condemned, and considering the likelihood that its license would have been renewed had New Melones not gone ahead. Under the case as it stands, PG & E got what its remaining 10½ months was worth, plus the salvage value of its plant, but got no compensation for the money Old Melones would have generated had its license been renewed. PG & E submitted evidence that hydropower licenses of this sort were usually renewed, so a buyer would pay something which accounted for the high likelihood of renewal.

The district court excluded from the evidence on the summary judgment motion PG & E's proffered appraisal, on the ground that it did not comply with the court's instructions on assumptions to be used. The excluded appraisal evaluated fair market value as $53 million. The appraiser generated this figure based on assumptions that even if PG & E could not get the license renewed, a buyer would estimate a substantial probability that it could use the water rights from Old Melones, put together a development project for New Melones, and get a federal license for a non-federal New Melones project, and therefore would pay much more for Old Melones than salvage and 10½ months of income.

II

ANALYSIS

We review the grant of summary judgment *de novo*. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130

(9th Cir.1994). We review exclusion of evidence for abuse of discretion. *United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1027 (9th Cir.1985).

PG & E argues for an award of the value of an expectancy that its license would be renewed on the basis of *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973). The United States took Almota's grain elevator, which was on land leased from a railroad. The government proposed to pay for the value of the elevator assuming Almota would lose its right to use the property when the lease expired in 7½ years. Almota offered proof that, were it not for the condemnation, a willing buyer would pay something additional for the expectation that the railroad would renew the lease. The Court noted that an existing tenant usually has the inside track for a renewal, the landlord has an interest in keeping its property leased, and the government "may not take advantage of any depreciation in the property taken that is attributable to the project itself." *Id.* at 478, 93 S.Ct. at 796. The concurring Justices pointed out that Almota had agreed to bear the risk that the railroad would change its plans, but not that the government would condemn the property for another use. *Id.* at 479, 93 S.Ct. at 797. The Court therefore held affirmatively, on the question of, "[w]hether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed." *Id.* at 473, 93 S.Ct. at 794.

On the same day *Almota* came down, the Supreme Court went the other way in *United States v. Fuller*, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). In *Fuller*, a rancher raised cattle on land, different parts of which he owned in fee simple, leased from the state, and licensed from the federal government under revocable Taylor Grazing Act permits. The federal government condemned some of the fee simple land. The dispute was over whether fair compensation for the fee simple land should include the increased value of the fee land on account of the grazing permits. The grazing permits of course increased the practicality of raising cattle on the fee lands. The Court held that the government did not have to "pay for that element of value based on the use of respondent's fee lands in combination with the Government's permit lands." *Id.* at 493, 93 S.Ct. at 805. The principle was that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." *Id.* at 492, 93 S.Ct. at 804. The Court expressly notes that "[w]e do not suggest that such a general principle may be pushed to its ultimate logical conclusion." *Id.*

We conclude that *Fuller*, not *Almota*, supplies the proper resolution to the case at bar. In *Almota*, the interest which the tenant did not own, but which generated value for which the tenant should be compensated, was owned privately. In *Fuller* and in the case at bar, the interest generating the disputed value is owned by the condemning authority. It is one thing for the market to value the probability that a third party will exercise its liberty in a

particular way and make the government pay for that market value, but quite another to make the government pay for its own contractually preserved right to do as it chooses.

The 1955 license expressly tied the right to be compensated for an early termination to PG & E's rights under the 1929 license, which ended in 1977. PG & E owned the right to generate hydroelectric power, or get compensated for the taking of that right, until June of 1977. The United States owned the right to use its lands as it chose, even if it destroyed the value of PG & E's interest, after that date. The termination date in the 1929 license preserved that right to the government. To hold that PG & E could recover money for the expectation that the government would have renewed its license after 1977, " 'would be to create private claims in the public domain.' " *Fuller*, 409 U.S. at 493, 93 S.Ct. at 805. The government's position in the case at bar is analogous to the railroad's position in *Almota*, not the government's. A third party would pay Almota for the value of the expectation that the railroad would renew the lease, but the railroad would not have to buy from Almota the right to evict Almota when the lease ran out; it already owned that right.

PG & E's argument that it could expect the government to want to renew a license which generated domestic, nonpolluting power confuses a political prediction with a property right. Federal energy policy shifted significantly between 1929, when PG & E was licensed to operate the Old Melones Plant, and 1977, when the right to compensation under the license expired. PG & E protected the value of its investment against policy changes

by securing a 48 year license. After half a century, the government was free to change its policy, and had indicated its intention to do so by funding New Melones. PG & E's expectation based on its property rights expired in 1977, regardless of the political reasonableness of its hopes and expectations subsequent to that date. "Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment. Those based only on economic and political predictions, not property rights, are not protected." *Madera Irrigation District v. Hancock,* 985 F.2d 1397, 1400 (9th Cir.1993).

Though we have not found a case in which this court applied *Almota* or *Fuller* in precisely analogous circumstances, our prior decisions likewise suggest that the case at bar should be treated like *Fuller.* In *Ryan Outdoor Advertising, Inc. v. United States,* 559 F.2d 554 (9th Cir.1977), billboard companies sued the government for refusing to renew revocable permits, after government policies had changed to restrict billboards on federal lands. We rejected their inverse condemnation claim under *Fuller,* because, once their permits were revoked or expired, "[t]here was no longer any interest to be compensated." *Id.* at 557.

Likewise, in *United States v. 5.96 Acres (Knappton Towboat),* 593 F.2d 884 (9th Cir.1979), we held that the government did not have to pay for damage to Knappton's pilings and dikes in the river when the government's dam enlargement destroyed them, because Knappton built them pursuant to permits revocable at will and "has

no property interest cognizable under the Fifth Amendment," *Id.* at 887-88, following *Fuller* and *Ryan Outdoor Advertising*.

PG & E argues that the condemnation award cannot be reduced based upon decrease in market value attributable to the government project which causes the award. *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1969); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 636, 81 S.Ct. 784, 792, 5 L.Ed.2d 838 (1963). The principle is right, the application wrong. The government cannot pay less for *another's* property, where the value is reduced by the project necessitating the taking. *See, e.g., United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1367 (9th Cir.1976). But the government does not have to buy from a condemnee the right to use government property which is unencumbered by a property interest of the condemnee.

PG & E's argument that the district court should have admitted the appraisal necessarily fails because PG & E was entitled to no compensation for the government's use of federal lands after the right to compensation under the license expired. Exclusion of the report was therefore not an abuse of discretion.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. 3,613.95 Acres, Situated in Calaveras and Tuolumne Counties, State of California; and OAKDALE IRRIGATION DISTRICT, et al., Defendants.	CIVIL NO. S-2488 MLS (Filed Sept. 9, 1983)

MEMORANDUM AND ORDER

On June 20, 1972, the Government initiated this action to condemn certain property necessary for construction of the New Melones Dam and Reservoir ("New Melones"), as authorized by the Flood Control Acts of 1944 and 1962, Pub. L. No. 78-534, 58 Stat. 887 and Pub. L. No. 87-874, 76 Stat. 1173. The lands to be condemned include the Melones Dam and Reservoir owned by the Oakdale and South San Joaquin Irrigation Districts ("Districts"), which has now been completely inundated by New Melones. The Government has moved for partial summary judgment and seeks a ruling that no compensation is "owed the [D]istricts for the loss of the powerhead resulting from elimination of the fall of water through their dam." Government's Motion for Partial Summary Judgment, filed September 18, 1980 at 1. Oral arguments were presented on August 27, 1981, following which additional briefs were filed by the parties. The matter was deemed submitted on November 24, 1981 and the court,

having considered the oral and written arguments of counsel, now renders its decision. Although the rather complicated history surrounding the development of both the old Melones Dam and Reservoir and New Melones is obviously crucial to the analysis of the Government's motion, the court deems it unnecessary to set forth a detailed chronology at the outset. Instead, pertinent events and documents will be discussed in context.[1]

FEDERAL NAVIGATIONAL SERVITUDE

The Government argues that it is not constitutionally required to compensate the Districts for loss of the powerhead created by the fall of water through the old Melones Dam and Reservoir because condemnation of the dam was an exercise of its superior navigational servitude. The navigational servitude has traditionally been defined as the power of the federal government to interfere with the flow of navigable waters, without payment of compensation for the taking of state-created water rights, when necessary "to assure that such streams retain their capacity to serve as continuous highways for the

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[1] Although the only issue before the court at present is the *Districts'* right to compensation for loss of the powerhead at the old Melones Dam and Reservoir, defendant Pacific Gas and Electric Company ("PG&E") has also filed briefs in response to the Government's motion. Their arguments, which support the Government on some points and the Districts on others, have been addressed in this Memorandum and Order, but have not been specifically identified as attributable to PG&E. Obviously, their importance lies not in their source, but in their merit, and thus, they are included as arguments of either the Government or the Districts.

purpose of navigation in interstate commerce." *Kaiser Aetna v. United States*, 100 S.Ct. 383, 391 (1979). *See also United States v. Grand River Dam Authority*, 80 S.Ct. 1134, 1136 (1960); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261 (1956). The servitude power derives from the Commerce Clause, U.S. Const., art. 1, § 8, cl. 3. The determination as to whether it can be invoked in a given situation is a question of law; Congressional intent is dispositive on the issue and actual conditions at the site are irrelevant. *See United States v. Grand River Dam Authority*, 80 S.Ct. at 1136-37; *United States v. Twin City Power Co.*, 76 S.Ct. at 260; *United States v. Certain Parcels of Land Situated in the City of Valdez*, 666 F.2d 1236, 1240-41 (9th Cir. 1982). The Government asserts the servitude is applicable in the instant case because the pertinent legislation and legislative history establish that New Melones was intended to further navigation. The Government further contends that the servitude applies to the flow of the Stanislaus River regardless of whether it is navigable because the traditional scope of the servitude has been expanded to encompass takings on nonnavigable as well as navigable waters. For purposes of the navigational servitude argument, the Government is willing to assume that the Districts held a protectable state property interest in the powerhead.

In opposition to the Government's contentions, the Districts argue first that the relevant legislation and its history evidence a Congressional intent to pay compensation for water rights destroyed by New Melones notwithstanding any navigational purpose which may have been ascribed to it. In support of this argument they rely

heavily on the Ninth Circuit's interpretation of the preamble to the Flood Control Act of 1944 in *Turner v. Kings River Conservation District*, 360 F.2d 184, 193 (9th Cir. 1966). Alternatively, the Districts contend that invocation of the servitude in the instant case would be improper because the Congressional documents authorizing New Melones indicate that it was not intended to further navigation. Finally, they argue that even if New Melones was intended to benefit navigation, there remains an issue as to whether the Stanislaus is a navigable river; the Districts do not agree that the servitude extends to non-navigable waters.

The servitude issue was discussed at the August 27, 1981 hearing on the Government's motion for partial summary judgment. At the conclusion of the hearing, the court denied the motion insofar as it was based on that ground. The bases for the ruling are explained below.

The court concludes that the Districts are correct in arguing that the statutes and legislative history pertinent to New Melones must be read as evidence of Congressional intent to preclude invocation of the navigational servitude on that project, regardless of whether it was intended to benefit navigation. In researching the issue, the court was guided by the analysis applied in *United States v. Gerlach Live Stock Co.*, 70 S.Ct. 955 (1950), wherein the Supreme Court, assuming that the Friant Dam had at least some effect on navigation, found that Congress had nonetheless intended to forego exercise of the navigational servitude and to pay compensation for water rights taken pursuant to the establishment of that project. The relevant legislative enactments in *Gerlach* were the Rivers and Harbors Acts of 1937 and 1940, 50 Stat. 844 and 54

Stat. 1198, the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, and the First Deficiency Appropriation Act, 49 Stat. 1622. In deciding that those Acts evidenced a Congressional decision to pay compensation to holders of riparian rights destroyed by the Friant Dam, the Court examined the statutory provisions of the Acts authorizing the Friant Dam, the legislative history relevant to the Dam, and past condemnation and compensation practices on the same project. Also significant was the fact that the Bureau of Reclamation had been charged with the construction, operation and maintenance of the dam.

In the instant case, the inquiry actually begins and ends with the first step – the relevant authorizing statutes. New Melones was originally authorized under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. Construction was not begun, however, until it was redesigned and reauthorized under the Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173. The preamble of the 1944 Act, 58 Stat. 887, which was expressly incorporated into the 1962 Act, 76 Stat. 1180, reads as follows:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of Congress to recognize the interest and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest extent established and potential uses . . . and to limit the authorization and construction of navigation works to those in which a

> substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

Although the preamble starts with a general statement to the effect that the Act concerns works "for navigation or flood control," the conclusion that the servitude was not to be invoked on the New Melones project itself is inescapable. First, it is much more likely that the reference to navigation was included by Congress to "justify making this undertaking a national burden by general reference to its power over commerce and navigation." *Gerlach*, 70 S.Ct. at 961. More important, and conclusive on the issue as well, is the Ninth Circuit's interpretation of the preamble in *Turner*, 360 F.2d at 193.

In *Turner*, the plaintiffs, who allegedly held rights in the Kings River under California law, sought to enjoin interference with those rights by federal employees working at the Pine Flat Dam. Pine Flat Dam, like New Melones, was authorized by the Flood Control Act of 1944, and the plaintiffs asserted that the preamble and Section 8 of the 1944 Act absolutely prohibited the government from taking state water rights in the construction and operation of any projects established thereunder. The Ninth Circuit declined to construe those two sections as a blanket prohibition against government takings in connection with projects authorized by the Flood Control Act of 1944. It held, however, that the preamble of the 1944 Act compelled the conclusion that such takings could not be accomplished pursuant to the navigational servitude and, thus, that the Government was required to pay just

compensation for any water rights taken. In addressing the preamble specifically, the Ninth Circuit stated that:

> [w]hile the words of the preamble of the [1944] Act may indeed reflect a concern that state-created private water rights be protected, the hazard sought to be avoided was not that federal officers would take such rights by eminent domain, in return for just compensation. Rather, *the language was intended to prohibit destruction of state-created water rights without any compensation at all, by the assertion of an overriding federal easement for navigation.*

Turner, 360 F.2d at 193 (emphasis added).

As noted above, the preamble to the 1944 Flood Control Act was incorporated into the 1962 Act, under which New Melones was ultimately authorized. Thus, the *Turner* prohibition on the use of the navigational servitude at the Pine Flat Dam, which was based squarely on the preamble to the 1944 Flood Control Act, is pertinent to New Melones as well. Indeed, it is pertinent to all projects authorized under the Flood Control Acts of 1944 and 1962 since both Acts incorporate the same preamble. Accordingly, the court concludes that the condemnation of the old Melones Dam and Reservoir was not an exercise of the Government's navigational servitude power.[2]

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[2] Because *Turner v. Kings River Conservation District*, 360 F.2d 184, 193 (9th Cir. 1966), is dispositive on the servitude issue, there is no need for the court to complete the *Gerlach* analysis, i.e., to examine any of the more specific provisions of the Flood Control Acts of 1944 and 1962 relating to New Melones or the legislative histories of those acts, to determine whether compensation was paid in other condemnation actions

RESERVED POWER INTEREST

The Government's second argument is that its "reserved power interest" defeats the Districts' claim for compensation for loss of the old Melones powerhead. More specifically, it contends that the location of a portion of the bed of the old Melones Dam and Reservoir within a federal powersite reserve as well as "the nature of the [Districts'] right-of-way through that reserve operate much like the navigational servitude in allowing the United States to exercise its paramount rights and destroy the Districts' powerhead without liability." Government's Motion for Partial Summary Judgment, filed September 18, 1980 at 25. The argument has three distinct formulations, each of which will be addressed separately. Before turning to that task, however, it is necessary to present pertinent background information.

Prior to constructing the old Melones Dam and Reservoir on the site they had chosen, the Districts were required to apply to the Secretary of the Interior for a right-of-way for irrigation purposes across certain public lands. *See* Section 18 of the Act of March 3, 1891, 26 Stat. 1095, as amended by the Act of May 11, 1898, 30 Stat. 404, 43 U.S.C. § 946, repealed by Pub. L. No. 94-579, 90 Stat. 2793 (1976) ("Act of March 3, 1891"). Because a portion of

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arising out of New Melones or to determine which agency controls its operation. Nor is it necessary to decide whether Congress intended New Melones to benefit navigation, since the *Turner* holding, like the holding in *United States v. Gerlach Live Stock Co.*, 70 S.Ct. 955, 962 (1950), was intended to preclude invocation of the servitude even if such were the case. Similarly moot is the question as to whether the servitude applies to nonnavigable waters.

those lands had been set aside as a water-power site (Power Site Reserve No. 86) by President Taft pursuant to the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. § 141, repealed by Pub. L. No. 94-579, 90 Stat. 2792 (1976), the Act of March 3, 1891 required the Districts to obtain the approval for the irrigation right-of-way from the Federal Power Commission ("the Commission").[3] The Commission approved the right-of-way on March 9, 1923, subject to the following conditions:

> 1. That the Oakdale Irrigation District, its successors or assigns, shall permit any licensee of the United States to develop power at said reservoir or to enlarge or modify the dam to be constructed by said District to produce additional storage if practicable for power, or both: *Provided,* That such licensee shall first make terms with the said Oakdale Irrigation District satisfactory to said District as to the use of lands or other property owned at the time by said District, and that the works or operation of said licensee shall not materially interfere with the use of said reservoir by said District, and that such licensee shall be liable to said District for any damages or expenses that may be caused to said District by the works or operations of such licensee; *Provided, further,* That in event of disagreement as to terms, or damages and expenses, the parties shall submit the matter to arbitration in the manner provided by the laws of the State of California.

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[3] The responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission in 1977 by 42 U.S.C. § 7172. That change has no bearing on the issues before the court.

> 2. In the event that said District shall itself desire to develop power at said reservoir it shall not proceed until it shall have secured authority therefor under the provisions of such laws of the United States as may then be in force concerning the development of water power.
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> 3. Such irrigation district shall so operate as not unnecessarily to interfere with the use of any waters not appropriated by it in the Stanislaus River, and shall also permit such use of water appropriated by it as will not interfere with said use by said District for its purpose.

See Federal Power Commission Approval of Location of Irrigation Reservoir, attached to Government's Reply, filed March 16, 1981 at Exhibit C.

The starting point of the Government's most complex argument in support of its reserved power interest theory is Article IV, § 3, c1.2 of the United States Constitution which provides that:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

From that point, the Government moves to the more specific principle, articulated in *United States v. Fuller*, 93 S.Ct. 801, 804 (1973), that the Government as condemnor is not "required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." In

Fuller, the Supreme Court held that the Government did not have to pay compensation for the enhanced value of condemned fee lands attributable to their potential use in connection with neighboring federal lands for which the fee owners held permits under the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* It was the Court's view that the payment of any compensation for that value would "create private claims in the public domain," *United States v. Twin City Power Co.*, 76 S.Ct. 259, 263 (1956), contrary to the express language of the Grazing Act which provides that permits are revocable and "shall not create any right, title, interest, or estate in or to the lands," 43 U.S.C. § 315(b). In sum, the Court held that the Government was not required to "compensate for value which it could remove by revocation of a permit for the use of lands that it owned outright." *Fuller*, 93 S.Ct. at 804.

The Government would have the court draw an analogy between the revocable permits in *Fuller* and the Districts' right-of-way in the instant case, which it characterizes as a revocable easement. It argues that it need not compensate the Districts for a "use of [their] lands such as power generation which is only possible in conjunction with Federal powersite reserve lands." Government's Motion for Partial Summary Judgment at 28. The attempted analogy, albeit a creative effort, fails in several respects.[4]

First, the success of the *Fuller* argument depends upon a finding that the Districts' right-of-way is nothing

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[4] The court notes that this argument, like the navigational servitude argument, assumes that the Districts hold power rights and focuses solely on how to take them away.

more than a "revocable easement" which conveys no interest in land. The court cannot accept that characterization. The Supreme Court has held that a right-of-way obtained pursuant to the Act of March 3, 1891, "An Act to repeal timber-culture laws, and for other purposes," is a "limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated . . . " *Kern River Co. v. United States*, 42 S.Ct. 60, 62 (1921). *See also Verde River Irrigation and Power District v. Salt River Valley Water Users' Association*, 94 F.2d 936, 940 (9th Cir. 1938). In so holding, the Court appeared to be relying on *Rio Grande Western Railway Co. v. Stringham*, 36 S.Ct. 5, 6 (1915), wherein the same definition was applied to a railroad right-of-way obtained pursuant to the Act of March 3, 1875, "An Act granting to railroads the right of way through the public lands of the United States," 18 Stat. 482, 43 U.S.C. §§ 934-939 ("Act of March 3, 1875"). *Stringham*, however, was subsequently overruled by *Great Northern Railway Co. v. United States*, 62 S.Ct. 529 (1942), which held that a right-of-way under the Act of March 3, 1875 was not a "limited fee" but "only an easement." The Government argues that *Great Northern Railway* overruled *Kern River* as well, since *Kern River* relied on *Stringham*. The court finds that argument untenable.

Great Northern Railway and *Stringham* defined railroad rights-of-way held under the identical statute, the Act of March 3, 1875. The right-of-way characterization ultimately chosen in *Great Northern Railway* was based on a thorough examination of the legislative history of the Act of March 3, 1875. To apply it to a right-of-way obtained under an entirely different act, the Act of March

3, 1891, without an analysis of that act's history would expand the *Great Northern Railway* decision far beyond its facts. The Act of March 3, 1891 has its own history. In fact, the regulations which were enacted to implement the Act of March 3, 1891, and which were in effect when the Districts obtained their right-of-way, provide that:

> [t]he right granted is not in the nature of a grant of lands, but is a base or qualified fee. The possession and right of use of the lands are given for the purposes contemplated by law, but a reversionary interest remains in the United States, to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way.

36 Pub. Lands Dec. 568 (1907-1908). In this court's view, the citation to *Stringham* in *Kern River* should be interpreted only as mention of what was then thought to be a comparable right-of-way interest. The fact that the comparison may no longer be apt does not destroy *Kern River*. The court finds *Kern River* controlling in characterizing the Districts' right-of-way under the Act of March 3, 1891, and thus concludes that the right-of-way is a limited fee subject to a reversionary interest in the Government.[5]

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[5] Even if *Kern River Co. v. United States*, 42 S.Ct. 60 (1921) had been overruled, the court would see no point in quibbling over whether the Districts' right-of-way is a "limited fee" or an "easement." The issue addressed in *Great Northern Railway Co. v. United States*, 62 S.Ct. 529 (1942) was whether the petitioners' railroad right-of-way under the Act of March 3, 1875 included the right to the oil and minerals beneath it. The Supreme Court decided that it did not and further concluded that the term "fee" should be replaced by "easement," presumably because "fee"

The *Fuller* argument also fails because the relationship between the Districts' privately owned lands and the right-of-way does not parallel that between the condemned lands and the grazing permits in *Fuller*. *Fuller*

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implied a full transfer of title. The Court indicated that the right-of-way included only use and occupancy of the land for the specific purpose specified in the statute – railroad construction. Whether in this case the Districts' right-of-way is deemed an easement or a limited fee, it is clear that it is comparable to the right-of-way in *Great Northern Railway* in the sense that neither conveys full title and both are limited to the express purpose for which they were granted. *See City and County of Denver v. Bergland*, 517 F.Supp. 155, 186 (D. Colo. 1981), *modified*, 695 F. 2d 465 (10th Cir. 1982) ("while the concept of a 'limited fee' may have been useful in distinguishing a particular sort of right-of-way from an easement at common law, I question whether it has any continuing vitality, especially given the railroad cases. A right-of-way that is not a grant of lands is more like an easement then [sic] a fee."). The more important question would be whether, as the Government contends, the easement or limited fee is revocable at will. In support of its contention that such is the case, the Government relies on 43 C.F.R. §§ 2801.1-1 and 2801.1-5(m) (1977). The court is not persuaded that those general regulations are pertinent. The Government has not explained why general regulations enacted in 1977 should supersede the regulations which were enacted specifically to implement the Act of March 3, 1891 and which were in effect when the Districts obtained their right-of-way. Moreover, *Great Northern Railway*, even if it overruled *Kern River* on the limited fee/easement distinction, did not address the question of whether a right-of-way under the Act of March 3, 1875 was revocable at will or was held subject to a reversionary interest in the Government should it cease to be used for the purpose intended. The investment that would necessarily accompany either right-of-way, i.e., the building of a railroad or a dam or irrigation canal, precludes any possibility that either one is revocable at will.

involved incremental value added to private lands by government permits to use neighboring federal lands for grazing. The permit lands and the private lands existed independently and had independent uses. It is impossible to find a comparable relationship between the right-of-way over federal powersite reserve lands in question and the Districts' privately owned property. The right-of-way which gave the Districts permission to use a strip of land in the bed of the old Melones Reservoir for irrigation purposes was an integral and essential part of the old Melones Dam and Reservoir project.[6] There would have been no reservoir without the right-of-way; the reservoir had no independent existence. Far from being an extra benefit conferred on entirely separate private lands of the Districts, the right-of-way was a necessary prerequisite to the establishment of the old Melones Dam and Reservoir which was, to say the least, a major financial undertaking. It would destroy all notions of ownership, equity and common sense to find that the Government's condemnation of the old Melones Dam and Reservoir in order to build its own dam and powerhouse could render all power rights that arose incident to the construction of old Melones worthless simply because the condemned lands

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[6] The Government and the Districts appear to be in agreement that the right-of-way lay across 353 acres of federal powersite reserve lands and was used in conjunction with 3,523.52 acres of land privately owned by the districts. *See* Government's Motion for Partial Summary Judgment, filed September 18, 1980 at 4; Districts' Opposition, filed October 27, 1980 at 1. It is undisputed that only 167 acres of the right-of-way lands lay beneath the high water mark of the reservoir itself. *See* Exhibits in Support of Districts' Opposition filed October 27, 1980 at Exhibit C, Declaration of Noel A. Negley.

encompassed an irrigation right-of-way across a relatively small strip of federal powersite reserve land in an otherwise privately owned and financed reservoir.

Having addressed what it believes to be the shortcomings of the *Fuller* analogy, the court turns to the next formulation of the Government's reserved power interest argument. This argument also assumes that the Districts held power rights. It is grounded on the theory that the Government, as a property owner, "may change the use of its property as if it were a private party, without paying compensation for the loss in value suffered by neighboring land." *United States v. Fuller*, 93 S.Ct. 801, 808 (1973) (Powell, J., dissenting). It is the Government's position that it was merely changing the use of its property when it took the Districts' right-of-way in order to construct New Melones. And, the Government argues that it specifically reserved the right to accomplish that change when it conditioned the Districts' right-of-way upon granting the Commission full permission to authorize power generation on the reserve lands used by the Districts so long as the power licensees did not interfere with the Districts' irrigation rights. *See* Commission Approval of Location, attached to Government's Reply at Exhibit C. The argument fails to persuade.

The general "change in use" principle cited is taken from the dissenting opinion in *Fuller*, where it is set forth without citation and is noted only in passing. Without some analysis of the principle, the court is unwilling to accept it as controlling. Although the Government owns the land on which the powersite reserve is located, the court has difficulty accepting the Government's assumption that it is to be viewed as a property owner rather

than a condemnor in the instant case. The validity of that assumption is dependent upon how the Districts' right-of-way is characterized, and, as already explained, the court is satisfied that the right-of-way, be it an easement or a limited fee, *see* note 4 *supra* at p.11, is a protectable, albeit limited property interest. Moreover, the leap of logic required to analogize loss of a right-of-way that is an integral part of a major irrigation project located almost entirely on private lands to a situation where the Government changes the use of its own property and affects the use of "neighboring land" is greater than this court can indulge. Furthermore, the reservation of power authorization rights by the Commission in the right-of-way approval is not tantamount to a statement that no compensation is to be paid for property interests taken pursuant to that reservation. The right-of-way approval specifically protected the Districts' irrigation rights. More important, an examination of the Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, makes it clear that the combination of Government ownership and regulation of powersite reserve lands was not intended to create the kind of "power servitude" the Government describes. For example, while 16 U.S.C. § 818 denies compensation for taking land used pursuant to a power right-of-way over powersite reserve lands, it clearly provides for "payment of any damages to crops, buildings, or other improvements caused thereby. . . . " Similarly, 16 U.S.C. § 821 provides that:

> [n]othing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or destruction of water used in irrigation or

> for municipal or other uses, or any vested right acquired therein.

And, 16 U.S.C. §§ 807 and 828-828(c) require the Government to pay for lost power generation potential when it displaces the works of power licensees by its own projects. Thus, the court cannot subscribe to the theory that the Districts lost their power rights because the Government changed the use of its property.

That brings the court to the third formulation of the reserved power interest argument which, finally, directly addresses the question of whether the Districts hold any cognizable rights in the powerhead. The Government contends that the Districts have no such rights because they have neither a state permit to appropriate water for power uses nor a Commission license or right-of-way authorizing power generation. This assumes that the only possible way to acquire rights in a powerhead is to be explicitly granted permission to use it to generate power. Leaving aside for the moment the possibility that the Districts' right to exploit the powerhead might be compensable as "consequential damage" or part of the fair market value of their lands, that assumption appears sound. No one has argued that the Districts purported rights are riparian or pointed to any other possible source.

In order to generate power on federal powersite reserve lands in California, one must obtain a permit to appropriate water for power generation from the state, Cal. Water Code §§ 102, 104, 1260 and 1263, and a power project license from the Commission, 16 U.S.C. § 797(e). An applicant for a federal power license must provide

satisfactory evidence of compliance with applicable state laws. 16 U.S.C. § 802(b). Thus, while the Commission *regulates* power generation, the *water* rights necessary to generate power have their origin in state law. *See Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vermont 1982). The Government contends that defendant Pacific Gas and Electric Company ("PG&E") holds the state appropriative rights for power generation at the old Melones Dam and Reservoir pursuant to License Number 985, issued on March 2, 1931. *See* Government's Reply at 4-5. It further argues that the Commission licenses for Projects 708 and 1230, which authorize power generation at the old Melones Dam and Reservoir, were issued only to PG&E. *See* Supplement to Government's Motion for Partial Summary Judgment, filed September 12, 1980 at Exhibit a (License for Project 708) and Exhibit f (License for Project 1230). If that is true, the court agrees that the Districts have no *explicit* property right to generate power. Nonetheless, at this point the court is not prepared to grant summary judgment for the Government even on that limited ground.

It is uncontradicted that PG&E holds the necessary Commission licenses and rights-of-way, for certified copies of those licenses have been presented to the court as evidence. No one, however, has submitted the relevant state permit. The only information regarding that document is set forth in the Government's reply brief. Until such time as proper evidence of that permit is brought before the court, it is impossible to determine whether the state granted the Districts any power rights at the old Melones Dam and Reservoir. And, that disputed issue precludes summary judgment. *See* Fed. R. Civ. P. 56.

The court is aware that the 1925 Melones Contract between PG&E and the Districts, which governed the construction and operation of the old Melones Dam and Reservoir, contemplated that all power rights were to be held by PG&E. *See* Melones Contract, filed August 12, 1980 at III and IV. However, because no state permits to appropriate water for power purposes have been introduced as evidence, the court cannot be certain that this came to pass. Section XII of the Melones Contract indicates that the respective water rights of the Districts and PG&E were unsettled at the time they entered into the contract. Moreover, while it would appear that the consideration paid by PG&E to the Districts under the Melones Contract was for PG&E's proportionate share of dam construction and maintenance costs, it is also possible that PG&E was paying for water rights held by the Districts. In this regard, it is interesting to note that the House Document authorizing New Melones refers to the Melones Contract payments as payments "[f]or the falling water privilege." House Document No. 453, 87th Congress, 2d Session at page 26 (1961). The court has not forgotten that Commission authorization is required along with a state water permit in order to perfect power generation rights. It notes, however, that if the Melones Contract reflects a sale of water rights, it may be possible to construe the approval of that contract in Project License 708 as a limited power license granted to the Districts. In sum, although persuaded that the Districts needed a state permit to appropriate water for power generation in order to establish an explicit property right to exploit the power potential of the old Melones Dam

and Reservoir, the court cannot at this time conclude that they did not hold such a permit.

CONSEQUENTIAL DAMAGES

The Government's final argument in support of its motion for partial summary judgment is that the Districts' loss of their purported right to exploit the old Melones Dam and Reservoir powerhead constitutes consequential damage and is therefore non-compensable. For purposes of this argument, it is necessary to describe the nature of the Districts' purported water rights.

In 1952 the Districts and PG&E entered into the Tri-Dam Contract pursuant to which the Districts were to construct three dams with appurtenant power plants on the Stanislaus River. Two of the dams were located upstream from the old Melones Dam and Reservoir and the third was downstream. PG&E was to purchase the power generated by the Districts. *See* Exhibits to Districts' Opposition, filed October 27, 1980 at Exhibit A. In addition, PG&E was to pay the Districts $68,000 per year for "benefits to be received by Pacific [Gas and Electric Company] in increased capacity and energy from Melones Plant as a result of completion and operation of the . . . entire project. . . . " *Id.* at page 28. This was termed the "Melones Amount," and was to be paid through the year 2004, when the Tri-Dam Contract was to expire. The payment by PG&E for increased headwater benefits afforded by the Districts' new projects was required by statute. *See* 16 U.S.C. § 803(f). *See also* Supplement to Government's Motion at Exhibit m.

When New Melones was authorized, Congress provided for payment to the Districts of the present value of the Melones Amount through the year 2004. *See* House Document No. 453 at 35, 64, 65, 68. The Government argues that this was an administrative payment for consequential damages not required to be compensated under the Fifth Amendment. Thus, it argues that any additional profits which might have derived from creating headwater benefits either before or after 2004, are also consequential damages and, as such, not compensable.

The Districts are willing to accept that the Melones Amount covers the loss of their powerhead rights through 2004. They contend, however, that the Melones Amount was paid to them as compensation for taking their right to exploit the powerhead at the old Melones Dam and Reservoir. And, their position is that that interest is a vested state right and compensable in perpetuity.

First, it should be noted that *if* the Districts can establish that they have powerhead rights recognized by state law and the Commission, the consequential damage issue will be moot. However, if no such rights are established, the consequential damage argument would become pertinent. Since the parties have briefed the argument, the court will discuss it at this time.

Assuming for purposes of this argument that the Districts had no independent property rights in the powerhead, and assuming further that those rights belonged to PG&E, the court finds itself compelled to agree with the Government that no compensation is due for the Districts' alleged right to exploit the old Melones Dam and Reservoir powerhead beyond the year 2004. First,

even though the the [sic] Government has agreed to pay the Melones Amount through the end of the Tri-Dam Contract period, there is no basis for the Districts' assertion that the payment is to compensate for the loss of a property interest that can be described as the right to exploit the old Melones Dam and Reservoir powerhead. PG&E would have paid the Districts for the headwater benefits covered by the Melones Amount even if the Districts did not own the old Melones Dam and Reservoir. The benefits were created entirely by the Districts' new projects on the Stanislaus River, were appropriated for power at the old Melones Dam and Reservoir *solely* by PG&E, and payment to the Districts therefor was required by statute. The arrangement involved a right in the old Melones Dam and Reservoir only insofar as it involved *PG&E's* rights to that powerhead; the condemnation of the old Melones Dam and Reservoir did not effect a taking of the *Districts'* right to exploit that powerhead.

On the other hand, there are two alternative rationales that explain the payment, both of which lead directly to the conclusion that the Districts have no right to be compensated for what they describe as their right to exploit the old Melones Dam and Reservoir powerhead after 2004. It is most likely that the loss described here is really loss of an opportunity to exploit a contract. In other words, the loss is not attributable to a direct taking of the Districts' property but is a consequential damage flowing from a lawful exercise of the government's condemnation power, in the instant case its condemnation of PG&E's power plant at the old Melones Dam and Reservoir. *See Mitchell v. United States*, 45 S.Ct. 293 (1925); *Omnia Commercial Co. v. United States*, 43 S.Ct. 437 (1923); *PVM*

Redwood Co., Inc. v. United States, 686 F.2d 1327 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 731 (1983). It constitutes frustration of an opportunity, rather than appropriation, and as such is not compensable. *Mitchell*, 45 S.Ct. at 294; *Omnia*, 43 S.Ct. at 438. Under this view, it is only through the Government's largesse that the Districts are being paid the Melones Amount. Obviously, there is no basis to require the Government to extend this "kindness" beyond 2004.

Alternatively, it can be viewed that the loss involved here resulted from the appropriation of the Tri-Dam Contract. *See Cincinnati v. Louisville and Nashville Railroad Co.*, 32 S.Ct. 267, 268-69 (1911); *Long Island Water-Supply Co. v. Brooklyn*, 17 S.Ct. 718, 720-21 (1897). If that is the case, the Government's payment of the Melones Amount was required, but that contract loss is obviously not compensable beyond the year 2004. In short, the loss of the right to exploit the powerhead, as measured by the value of potential headwater benefits beyond the year 2004, cannot be treated as the loss of a property interest. Rather, it must be viewed as consequential damage, and extremely speculative damage at that, for which the Government is not required to compensate the Districts.[7]

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[7] The conclusion that the right to exploit the powerhead after the year 2004 is not compensable as a separate property interest does not mean that the possibility of receiving compensation for such an interest is entirely foreclosed. Congress has provided that:

> [i]n all cases where real property shall be taken by the United States for public use in connection with an improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation

CONCLUSION

By its motion for partial summary judgment, the Government sought to have the court answer yes or no to the question of whether the Districts held a compensable interest in the old Melones Dam and Reservoir powerhead. As is readily apparent, the question cannot be easily answered. "[S]ummary judgment is proper only when there is no genuine issue of any material fact or when viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law." *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1006 (1982). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact, and "if the movant satisfies the initial burden, the burden shifts to the opponent to come forward with specific facts showing that a genuine

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> proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based on all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.

See 33 U.S.C. § 595(a). *See also United States v. Powelson*, 63 S.Ct. 1047, 1052-1053 (1943) (fair market value of land includes adaptability for special uses, provided they are not too speculative; the burden of establishing the value of condemned lands is on the landowner).

factual issue remains for trial." *Feldman v. Simkins Industries, Inc.*, 679 F.2d 1299, 1305 (9th Cir. 1982).

In the instant case, each ground asserted in support of the Government's motion presented a major area of dispute. If the court had agreed that the Government exercised its navigational servitude in condemning the old Melones Dam and Reservoir, it would have granted the motion for partial summary judgment, for such a ruling would have been dispositive as to any and all purported property rights in the powerhead as a matter of law. The same is true for the "revocable permit" argument based on *United States v. Fuller*, 93 S.Ct. 801 (1973) and the "change of use" argument. Because the court found those arguments unpersuasive, however, it was necessary to address specific avenues by which the Districts might claim their property interest in the powerhead. As explained, the court concluded that there was insufficient evidence to determine whether the Districts held any state appropriative rights which might have given rise to a compensable property interest in the old Melones Dam and Reservoir powerhead. It also found that without such an interest, the alleged powerhead rights must be viewed as consequential damages, which would not be compensable except perhaps as enhancement of the fair market value of the Districts' condemned lands. Although not dispositive on the question of the Districts' powerhead rights, these conclusions should contribute substantially to the resolution of this difficult issue.

In accordance with the foregoing, IT IS HEREBY ORDERED that the Government's motion for partial summary judgment is DENIED.

DATED: September 9, 1983.

/s/ Milton L. Schwartz
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

42.13 ACRES OF LAND, MORE OR LESS, SITUATED IN TUOLUMNE AND CALAVERAS COUNTIES CALIFORNIA, AND PACIFIC GAS AND ELECTRIC COMPANY, et al.,

Defendants.

CIV. NO. S-76-379 EJG

(Filed Jun. 28, 1988)

MEMORANDUM OF DECISION AND ORDER

This action was before the court on March 4, 1988 on plaintiff and defendant Pacific Gas and Electric Co. (hereafter "PG&E")'s cross-motions for summary judgment, and on plaintiff's motion for appointment of a commission to measure just compensation pursuant to Fed.R.Civ.P. 71A(h). Both cross-motions address the issue of whether PG&E's just compensation for plaintiff's taking should be limited by the terms of Article 36, a provision in PG&E's license to operate its Old Melones power plant, which was rendered ineffective by plaintiff's taking in 1976.

On July 13, 1987, United States District Court Judge Milton L. Schwartz recused himself from this case, the parties' motions were taken off calendar, and the case was reassigned to the undersigned. Since Judge Schwartz's recusal, the parties have filed additional briefs relevant to the cross-motions for summary judgment

which have been considered by the court. In addition, the court has also considered both parties' post-hearing memoranda in reaching the decision set forth herein.

Factual Background

In 1929, The Federal Power Commission, or FPC (now the Federal Energy Regulatory Commission, "FERC") issued a fifty-year license to PG&E to operate the Old Melones power plant. The 1929 license contained a provision in which the FPC waived all conditions, provisions and requirements of the Federal Water Power Act of 1920, superseded by the Federal Power Act, 16 U.S.C. § 792, *et seq.* In 1953, before the expiration of the 1929 license, PG&E filed an application for a new license to extend through the year 2000 in order to facilitate the financing of surrounding power projects from which it intended to buy power. The new license encouraged voter approval of the surrounding power projects by ensuring that the projects would have a ready, long-term customer, namely, PG&E. In 1955, the FPC granted the license, which incorporated the contested provision, Article 36.

Article 36 limits PG&E's damages, in the event its land-use is impaired by construction of a New Melones Reservoir by the United States, to only those damages permissible under the 1929 license. What is less clear, however, is whether Article 36 applies to the current New Melones project, which is much larger than the originally planned reservoir PG&E claims is referred to in Article 36. If Article 36 applies, PG&E's consequential, or severance, damages are limited to the period between plaintiff's complaint in condemnation filed July 13, 1976 and

the expiration of PG&E's 1929 license on June 1, 1977. Plaintiff's complaint sought to permit construction of a New Melones Dam and Reservoir by condemning only certain land containing PG&E's water pipelines but not the power plant itself. For the reasons stated below, the court concludes that summary judgment for plaintiff is proper on the issue of whether Article 36 applies to damages caused by the particular project for which PG&E's property was condemned. The court also discusses, but does not decide, plaintiff's motion for appointment of a commission.

The Applicability of Article 36

This court is required to enter summary judgment in favor of a party on issues which involve no genuine issue of material fact and on which that party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The issue here is whether, in issuing the 1955 license to PG&E, the FPC intended Article 36 to apply to damages caused by the particular power project which necessitated this taking and which impaired PG&E's operation of its Old Melones power plant. The parties' briefs contain conflicting interpretations of the language and administrative history of the license, but no genuine disputes of material fact.

PG&E asserts that the current project had not been authorized at the time the 1955 license was issued. Instead, PG&E argues that the current government project was authorized only later, in 1962. For that reason, PG&E contends that in 1955 the FPC neither intended nor

had the power to issue a license which limited compensation caused by a United States project not yet authorized. PG&E contends that the instant United States project was authorized only after 1955 by the Flood Control Act of 1962. Plaintiff disagrees and correctly resolves this issue of law by citing *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814, 815 (9th Cir. 1983). In that case, the Ninth Circuit specifically held that the United States' current project had been authorized by the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. For this reason, PG&E's arguments fail. *Libby, Rod and Gun Club v. Poteat*, 594 F.2d 742, 722, 745 (9th Cir. 1979), cited by defendant, is inapposite because that case discussed specific language of a different flood control act applied to a different dam. *Environmental Defense Fund*, in contrast, specifically addressed the precise flood control act and project at issue in this case.

PG&E strenuously argues that the 1962 legislative process culminating in the approval of the New Melones project shows that the current project was not authorized until 1962. This argument fails to recognize the difference between congressional authorizations and modifications of projects already authorized. As noted above, the Ninth Circuit has held that the New Melones project was authorized by the Flood Control Act of 1944. The House version of the Flood Control Act of 1962 makes it abundantly clear that "The New Melones project, . . . *authorized* by the Flood Control Act approved December 22, 1944" was merely "*modified*" in the 1962 Act. 108 Cong. Rec. at 21882 (1962) (emphasis added).

While there appears to be no genuine issues of material fact, PG&E's arguments, discussed below, show that

the language of Article 36 is somewhat ambiguous. This court cannot enter summary judgment on an issue involving interpretation of an ambiguous agreement where there remains any litigable extrinsic evidence needed to illuminate the interpretation. *Jewel Companies v. Pay Less Drug Stores Northwest*, 741 F.2d 1555, 1566 (9th Cir. 1984). Both parties' counsel have agreed on the record to submit this issue for summary judgment since no additional litigable extrinsic evidence remains. Accordingly, this court decides this issue of interpretation as a matter of law.

As a matter of law, Article 36 applies to the instant taking for two reasons. First, the fair import of the Department of Interior recommendation underlying Article 36 was to limit the United States' liability in the event *any* United States power project impaired defendant's Old Melones power plant. (*See* plaintiff's exhibit B). The Department of Interior most likely intended to avoid high consequential compensatory damages covering the full term of PG&E's second license because the Department knew that *some* type of United States project would almost certainly impair the project during that time. In 1955, the FPC could not be sure that the smaller reservoir referred to in Article 36 would be constructed, as in fact it was not. Second, and equally important, PG&E has not shown that the FPC had any reason to exclude from Article 36's coverage all projects other than the smaller reservoir. The United States would incur significant liability regardless of the particular project which ultimately harmed PG&E. A fair reading of the Department of Interior's recommendation strongly suggests that the Department was concerned with damages arising from any

construction then authorized on the New Melones project. As discussed above the current larger project had been authorized at the time of this recommendation. Neither the 1955 license itself nor the FPC's accompanying order mention any limitation, or indeed any alteration whatsoever of this recommendation.

PG&E's counter-arguments reveal only that Article 36 is somewhat ambiguous since it does not specify the exact extent of the construction covered by the project. However, the article "a" in the phrase "a New Melones Reservoir", indicates, if anything, an intention not to restrict this provision to any particular smaller project under consideration in 1955. Again, PG&E offers no practical explanation of why the FPC would so delimit Article 36. Finally, PG&E argues that the phrase "up to 1977" indicates an intent to limit application of the damages limitation provision to the period before 1977. This interpretation flies in the face of the principal reason the Department of Interior recommended the provision. The Department's recommendation reveals the intent to cover the post-1977 period and supports this court's interpretation of the broad preventive purpose underlying Article 36:

> The significance of the effect of the grant of the 1955 license upon the cost to the United States of undertaking the New Melones Reservoir and Power Plant would appear to depend upon the timing of construction of the New Melones development since the compensation payable would in large measure be proportionate to the *unexpired portion* of any outstanding license.

(Plaintiff's exhibit B, p.2) (emphasis added). The Department found, and the court agrees, that the FPC precisely intended Article 36 to limit the United States' liability *after* 1997.

The Effect of Article 36's Waiver

Plaintiff argues that, by incorporating the waiver of the 1929 license into the 1955 license, Article 36 precludes PG&E from claiming compensation based on added value arising from defendant's expectancy of a license renewal. Plaintiff is correct that a provision in the 1929 license operates, in part, as a valid waiver of certain of PG&E's rights under 16 U.S.C. §§ 801-808 (henceforth referred to by section number). *See Wisconsin Power and Light Co.*, 33 F.P.C. 275 (1965). PG&E does not contest the authority of the FPC to so condition the 1955 license regarding damages stemming from United States projects authorized at the time of issuance. Since Article 36 waives PG&E's § 808 right to automatic annual renewals when the United States neither declares a taking nor issues a new license, plaintiff argues that PG&E cannot claim added value based on an expectancy of renewal. However, a waiver of § 808 does not necessarily mean that the granting of a new license was in fact unlikely. Nor does waiver of § 807 alter PG&E's right to just compensation since that section expressly preserves the right to just compensation as independent of the statutory provision. In addition, while it is clear that Article 36 was intended to minimize PG&E's severance damages caused by the New Melones project, there is no clear indication that Article 36 was further intended to limit PG&E's basic rights to just compensation. In short, Article 36 contains no waiver of

PG&E's right to argue for the value of prospective license renewal as part of just compensation.

PG&E is correct that the right to argue for the value of prospective license renewal exists independent of the statutory rights which PG&E waived. *See Almota Farmers Elevator Warehouse Co. v. United States,* 409 U.S. 470, (1973) (established a right to argue for added compensatory value based on the prospect of *lease* renewal). *But see, United States v. Fuller,* 409 U.S. 488, (1973) (refused to consider value added to land due to the land's proximity to grazing lands since the government created the value by issuing the grazing permits). Neither case is directly applicable here. However, this court does not need to reach this constitutional, Fifth Amendment question because there are statutory grounds on which to resolve the dispute. *See Escambia Co. v. McMillan,* 466 U.S. 48, 51, (1984).

As to takings in connection with improvements to United States rivers, Congress has enlarged the just compensation rights enunciated in *Fuller* by enacting the Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 111 (Dec. 31, 1970), *codified as* 33 U.S.C. § 595(a) (henceforth, "Section 111"). *See also United States v. 320 Acres of Land,* 605 F.2d 762, 784 n.27 (5th Cir. 1979); *United States v. 967,905 Acres of Land,* 447 F.2d 764, 770 (8th Cir. 1971). Section 111 gives PG&E the right to argue for added value based on the expectancy of license renewal. *See United States v. 8,968.06 Acres of Land,* 326 F.Supp. 546, 547-48 (S.D. Tex. 1971). *See also, United States v. 15.65 Acres of Land,* 609 F.2d 1329, 1333, n.5 (9th Cir. 1982) (holding that condemnee was entitled to attempt to prove the possibility of favorable zoning changes).

In addition, a judge must permit evidence of prospective use to reach the jury where a "reasonable possibility" of such future use exists. *United States v. 320 Acres of Land, supra,* at 819. Courts must not consider the impending government project as a basis for decreasing this possibility. *United States v. 8,968.06 Acres of Land, supra,* at 549. *See also, United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 635-36 (1963). This approach is consistent with that utilized by the *Amota* court in assessing the possibility of lease renewal. *See Almota, supra,* at 474. In the instant case, plaintiff has cited no compelling contrary authority. Therefore, assuming the non-existence of the impending government project, the court finds that, although weak at best, a possibility existed at the time of the taking that PG&E's license would be renewed. (See PG&E's opposition brief at pp. 22-23). The weight of plaintiff's evidence under all the circumstances is a question of fact for the jury and, hence, inappropriate for resolution on summary judgment. *United States v. 320 Acres of Land, supra,* at 816, *citing United States v. 100 Acres of Land,* 468 F.2d 1261 (9th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973).

For the reasons stated above, PG&E's rights to compensation are limited to the compensation PG&E could have received under the 1929 license for Project No. 708, which included a valid waiver of all PG&E's statutory rights under 16 U.S.C. 792 *et seq.* except for rights expressly reserved in the license. Just compensation shall include any added value found to be due to PG&E's expectancy of license renewal.

Plaintiff's Motion to Appoint a Commission

At the hearing on March 4, 1988, the court raised questions concerning the practical considerations of appointment of a commission to determine the amount of just compensation. A further hearing was scheduled for June 24, 1988 and a supplemental brief addressing these issues was submitted by the United States. PG&E did not submit an additional brief, apparently intending to respond to the court's inquiries at the hearing. The June 24, 1988 hearing date is hereby vacated. However, because both parties have requested an opportunity to orally address the issue of appointment of a commission, the hearing is rescheduled for July 29, 1988 at 9:00 a.m. A supplemental brief from PG&E is requested by the court, limited to the issues raised at the March 4 hearing and addressed by the United States in its supplemental brief, filed June 10, 1988. The brief shall be filed by July 8, 1988, to which the United States may file a reply, if necessary, by July 15, 1988. The briefs shall not exceed fifteen (15) pages in length.

IT IS SO ORDERED.

DATED: June 28, 1988.

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES
DISTRICT COURT

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, V. 42.18 ACRES OF LAND, MORE OR LESS, SITUATE IN TUOLUMNE AND CALAVERAS COUNTIES, STATE OF CALIFORNIA, AND PACIFIC GAS AND ELECTRIC COMPANY, ET AL., DEFENDANTS.	CIVIL NO.: S-76-379-EJG (Filed Mar. 23, 1990)

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

The United States of America, plaintiff herein, requests clarification of the order dated June 28, 1988.

Plaintiff argues that the order is unclear in a manner which has far-reaching effects on valuation. The government's liability, according to its briefs, varies from $685,000 under one interpretation of the order, to $37,600,000 under another interpretation.

According to the Government, the order contradicts itself. On the one hand, it held that Article 36[1] applies to this case and precludes defendant, Pacific Gas and Electric Company, Inc. (hereafter, PG&E), from recovering the value of the property after June 1, 1977. On the other hand, it held that even though Article 36 applies to limit damages, PG&E should be given the opportunity to argue before a jury whether or not it was reasonable for PG&E to expect to renew the license. The prior order found disputed facts precluding summary judgment on this point.

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[1] Federal Power Commission License to Pacific Gas and Electric Company for Project No. 2130, issued 2/21/55, 14 FPC 556 (1955). Article 36 thereof provides:

> *Article 36.* In the event the existing Melones development of the Licensee shall be taken over in whole or part or impaired or damaged by the United States in connection with the construction, operation or maintenance by the United States of a New Melones Reservoir (authorized by Section 10 of the Act of December 22, 1944 [58 Stat. 887, 901] for construction by the Corps of Engineers) the compensation to which the Licensee shall be entitled for any such taking by the United States shall be no more up to June 1, 1977 (former expiration date of the license for Project No. 708) than it would have been entitled to under the license for Project No. 708.

After reviewing the two previous bench memos on this issue, including the one prepared by Judge Schwartz in this case, the cases cited in the prior order of June 28, 1988, and a trilogy of recent Supreme Court cases on summary judgment standards[2], the Court concludes that it should reconsider its decision and now reverses its previous ruling.

PG&E argues that plaintiff has not met the standards for reconsideration under Local Rule 230(k), i.e., that plaintiff has presented no new facts or law. That is not correct.

Of great concern to the Court at the time of the prior ruling on this issue in 1988 was the effect that leaving this window open would have on damages. That concern is expressed in the order, internal memos and bench notes on the case.

The parties' briefs were not responsive to this concern. However, in the last eighteen months, discovery has shown that the differing damage computations resulting from the various interpretations of the prior order are radically diverse. Plaintiff contends the range is from $685,000 to $37,600,000. This fact alone warrants reconsideration of the order.

The earlier order held that the issue of renewal expectancy value had to go to the jury if there was a "reasonable probability" that a chance for a renewal existed. Finding that PG&E had come forward with some

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[2] *Matsushita v. Zenith*, 475 U.S. 574 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, et al.*, 477 U.S. 242 (1986).

evidence of a possibility of renewal, the Court ruled that weighing of evidence on this issue was for the fact finder, and not the Court. In support of that proposition, the Court cited a 1972 Ninth Circuit case and a 1973 Supreme Court case, but did not review the motion under current summary judgment standards, an oversight to which the Court confesses.

One thing the condemnation cases relied on make very clear is that issues which affect valuation that depend on events which, " . . . while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration. . . . " *Olson v. United States,* 292 U.S. 246, 257 (1934). In addition, the determination of whether a reasonable probability exists is left to the judge. Quoting from *United States v. 320 Acres,* 605 F.2d 762, at 819 (5th Cir. 1979), " . . . If and only if [the Court] finds that [a reasonable possibility] exists, then the jury must consider and decide what effect this reasonable possibility of . . . [license renewal] has upon the fair market value of the condemned property".

Applying the summary judgment standards articulated by the Supreme Court in *Matsushita, Celotex* and *Anderson,* the trilogy of cases referred to above, there is no dispute concerning a material fact. In the factual context of this case, the probability of New Melones being constructed, the Government's insistence on including Article 36 in the 1953 renewal, and the Congressional authorization for construction of New Melones, makes PG&E's claim of expectancy of license renewal extremely implausible. Under *Matsushita,* when the non-moving

party's claim is implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show the existence of a genuine issue for trial. Here a review of the evidence shows that PG&E has not done that.

The evidence submitted in opposition to the motion for summary judgment did not meet PG&E's burden under *Celotex*. PG&E offered conclusory statements that because the Federal Energy Regulatory Commission has yet to deny a single application for a new license with terms and conditions similar to those in PG&E's license, a willing buyer would have assumed it reasonably probable that the license would have been renewed.

However, as stated above, when the evidence submitted is viewed in connection with the facts of this case, it becomes apparent that license renewal was not reasonably probable. Thus no reasonably-minded trier of fact faithfully applying the law could find that it represents an element of fair market value. See again, *United States v. 320 Acres*, previously cited. In fact, under that case the judge is required to exclude evidence of any such speculative use.

Nor does the Supreme Court *Almota*[3] case, which held that a lessee with no right of renewal was entitled to compensation for improvements made on the property because of the expectancy of renewal, further PG&E's position, because *Almota* did not involve contract interpretation. Here, PG&E contracted away its right to argue

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[3] *Almota Farmers Elevator and Warehouse v. United States*, 409 U.S. 470 (1973).

for renewal expectancy value. Even if that were not the case, it has failed to come forward with sufficient evidence on an element for which it bears the burden of proof at trial.

For these reasons, the earlier ruling is reversed in part. PG&E has not demonstrated a reasonable probability of renewal, and thus evidence of additional damages based on renewal expectancy value will not be allowed at trial. Partial summary judgment is granted in favor of the plaintiff on that issue.

IT IS SO ORDERED.

DATED: Mar. 23, 1990

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff. vs. 42.13 ACRES OF LAND, MORE OR LESS, SITUATE IN TUOLUMNE AND CALAVERAS COUNTIES, STATE OF CALIFORNIA, and PACIFIC GAS AND ELECTRIC COMPANY, et al., Defendants.	No. S-76-379 EJG ORDER RE: COMPENSABILITY OF WATER RIGHTS AS MODIFIED (Filed Jan. 3, 1991)

The Court's prior order addressed the question of the just compensation to be awarded for the taking of defendant's rights under its federal license to generate hydroelectric power. However, defendant's property interest in the license was not the only property right taken by plaintiff. Also taken was defendant's property interest in the land itself and a state-created right to appropriate water from the Stanislaus River for the purpose of generating power.

Article 36 of defendant's federal license to operate its Melones project, which we ruled limited compensation for the taking of the federal power generating license to about a year period, does not limit compensation for these other property interests.

The case of *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), cited by defendant, teaches that if the water rights held by the government are insufficient to accomplish a reclamation project, then it must acquire the necessary rights by condemnation, if necessary, and it must pay just compensation for those rights.

Plaintiff argues that it did not condemn PG&E's water rights and that therefore no compensation is due. However, a fair reading of the complaint and the notice of taking indicates otherwise. The description of the estate taken relating to Parcel B includes the fee simple title subject to any outstanding right to maintain and use a large underground tunnel for conducting water.

Defendant used this tunnel to bring water into the power plant. On July 8, 1976, plaintiff plugged the tunnel with cement and thereby took defendant's right to use

the tunnel for conducting water to the power plant. This effected a taking of defendant's water right.

Plaintiff next contends that even if the government actually did take the water right, defendant's exclusive remedy is a suit in the Court of Claims under the Tucker Act. The court fails to see the relevance of that argument. The Tucker Act places exclusive jurisdiction in the Court of Claims over claims founded on contract with the United States. Defendant's claim of entitlement to compensation for the taking of a water right in this case is not based on a contract with the United States.

Plaintiff also argues that if PG&E's water right lost value or expired because of the taking, that loss is but a consequential damage for which no compensation is due. However, the cases plaintiff cites for that proposition are simply not applicable. In this case the government took PG&E's tunnel, the means by which it exercised its water right and thereby took the water right. This direct taking entitles defendant to present evidence of the value of the water rights.

It is for these reasons that defendant's motion for clarification is granted. The prior rulings of this court did not preclude defendant from submitting evidence on the value of its state water right taken by plaintiff, and that evidence is not limited by Article 36 of the federal license for the period from the taking to the termination of the license.

IT IS SO ORDERED.

DATED: Jan 2 1991

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

42.13 ACRES OF LAND, more or less, situated in Tuolumne and Calaveras Counties, State of California, and PACIFIC GAS AND ELECTRIC COMPANY,

Defendants.

_____/

CIV. NO. S-76-379 EJG

ORDER VACATING FINAL PRETRIAL CONFERENCE AND TRIAL AND SETTING STATUS CONFERENCE

(Filed Jul. 9, 1992)

This matter was before the court on June 26, 1992 for a conference to settle instructions of law to the land commission appointed to try this case. During the course of that proceeding, the court reconsidered, at plaintiff's request, and reversed its previous ruling concerning the effect of Article 36 on the valuation of PG&E's water rights. The court explained its reasoning in open court on the record.

Counsel were then directed to contact the court within one week to report whether the effect of the ruling would require further discovery or trial preparation that would necessitate a continuance of the dates set for final pretrial conference and trial. Counsel for defendant

PG&E has now reported that such continuance is necessary to allow PG&E's appraisers an opportunity to submit supplemental reports. Additionally, counsel for both parties have indicated that they intend to commence settlement negotiations immediately. They also request that the court provide them with a draft of the full set of instructions to assist their negotiations. The court is encouraged by the prospect of settlement and will provide a draft of the instructions as soon as possible.

The court finds the water rights ruling appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), in the event that the parties are unable to reach a settlement. The water rights ruling referenced above involves a controlling question of law, in that the parties' disagreement over the value of PG&E's water rights, based on the court's rulings, is a difference amounting to millions of dollars. There is substantial ground for difference of opinion, as shown by comparing the court's two rulings on the issue, as well as by the fact that the issue appears to be one of first impression since the government has never before taken an operational hydroelectric power plant. Moreover, the application of California water law and Article 36 of the renewal license make this issue factually unique.

Finally, an immediate appeal on this issue may materially advance the ultimate termination of the litigation, since the process of trial by the appointed land commission, receipt of its report and any necessary hearing thereon could be a rather lengthy process in this case, which is already the oldest one on this court's docket. The disputed issues for trial are significantly narrower and the testimony and physical evidence to be submitted

will be drastically reduced under the court's recent ruling, but if that ruling proves incorrect and a new trial is necessary, all that evidence must be presented. Moreover, additional appraisals could be engendered by the delay inherent in the appellate process.

In view of the new developments in this case, the final pretrial conference scheduled for July 17, 1992 and the trial before the land commission tentatively scheduled for August 17, 1992 are hereby vacated. A status conference is scheduled for September 11, 1992 at 9:30 a.m. Ten days before the status conference, each party shall file a supplemental status report informing the court of the progress of settlement negotiations and appraisal reports, and the further scheduling of the case. Counsel shall also attempt to reach agreement on a new schedule and submit an amended scheduling order along with their status reports. If the new schedule is satisfactory to the court and discussion with counsel is not otherwise required, the court may vacate the status conference.

IT IS SO ORDERED.

Dated: July 8, 1992.

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

Federal Water Power Act, ch. 285, §§ 10(i), 14, and 15, 41 Stat. 1063, 1068, 1071-72 (1920) (codified as amended at 16 U.S.C. §§ 803(i), 807(a), and 808 (a))

Sec. 10. That all licenses issued under this Act shall be on the following conditions:

* * *

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than one hundred horsepower capacity, the commission may in its discretion waive such conditions, provisions, and requirements of this Act, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to lands within Indian reservations.

* * *

Sec. 14. That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together

with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they cannot agree, by proceeding in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided,* That such net investment shall not include or be affected by the value of any lands, rights of way, or other property of the United States licensed by the commission under this Act, by the license, or by good will, going value, or prospective revenues: *Provided further,* that the values allowed for water rights, rights of way, lands, or interest in lands shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

* * *

Sec. 15. That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided,* That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.